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Supreme Court, U.S.
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Nos. 02-1727, 02-1733, 02-1753

IN THE

Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN NATIONAL COMMITTEE, ET AL.,

Appellants/Cross-Appellees,

v.

FEDERAL ELECTION COMMISSION, ET AL.,

Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE POLITICAL PARTIES

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QUESTIONS PRESENTED

1. Do the associational and financial restrictions imposed upon national, state, and local political parties by Title I of the Bipartisan Campaign Reform Act of 2002, Pub. Law No. 107-155, 116 Stat. 81 ("BCRA"):

(a) infringe the rights of speech and association guaranteed by the First Amendment;

(b) exceed the powers granted Congress by Article I, Section 4 of the U.S. Constitution, violate principles of Federalism, and offend the Tenth Amendment; and

(c) abrogate the right of political party committees to equal protection of the law as guaranteed by the Due Process Clause of the Fifth Amendment.

2. Do the limitations imposed by Section 213 of BCRA on independent expenditures by a political party committee infringe the First Amendment?

3. Does the requirement in Section 214 of BCRA that the Federal Election Commission promulgate a definition of "coordination" that does not require proof of an "agreement" violate the First Amendment?

PARTIES TO THE PROCEEDING

Appellants and Cross-Appellees joining this brief were plaintiffs below in three of the consolidated cases: *Republican National Committee v. FEC*, No. 02-874; *California Democratic Party v. FEC*, No. 02-875; and *McConnell v. FEC*, No. 02-582. Appellants in No. 02-1727 (the "RNC Appellants") are the Republican National Committee ("RNC"); Robert Michael Duncan, former Treasurer, current General Counsel, and Member of the RNC; the Republican Party of Colorado; the Republican Party of New Mexico; the Republican Party of Ohio; and the Dallas County (Iowa) Republican County Central Committee. Appellants in No. 02-1753 (the "California Party Appellants") are the California Democratic Party ("CDP"); Art Torres, Chairman of the CDP; Yolo County Democratic Central Committee; California Republican Party ("CRP"); Shawn Steel, Chairman of the CRP; Timothy Morgan; Barbara Alby; Santa Cruz County Republican Central Committee; and Douglas Boyd, Jr. Appellant Libertarian National Committee, Inc. ("LNC") is one of the several appellants in No. 02-1733 and was a plaintiff below in *McConnell v. FEC*, No. 02-582. Collectively, the RNC Appellants, the California Party Appellants, and the LNC are referred to herein as the "Political Party Appellants."

The following were also plaintiffs in the actions indicated, all of which were consolidated below:[1]

McConnell v. FEC, No. 02-582: United States Senator Mitch McConnell, United States Representative Mike Pence and former Representative Bob Barr, Alabama Attorney General Bill Pryor, Alabama Republican Executive

[1] As indicated, several plaintiffs withdrew before the three-judge court issued its decision.

Committee (withdrawn), Libertarian Party of Illinois, Inc. (withdrawn), DuPage Political Action Council (withdrawn), Jefferson County Republican Executive Committee (withdrawn), American Civil Liberties Union, Associated Builders and Contractors, Inc., Associated Builders and Contractors Political Action Committee, Center for Individual Freedom, Christian Coalition of America, Inc. (withdrawn), Club for Growth, Indiana Family Institute, National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, National Right to Work Committee, 60-Plus Association, Inc., Southeastern Legal Foundation, Inc., U.S. English d/b/a/ ProENGLISH, Martin Connors (withdrawn), Thomas McInerney, Barrett Austin O'Brock, Trevor Southerland.

National Rifle Ass'n v. FEC, No. 02-581: National Rifle Association of America ("NRA"), NRA Political Victory Fund.

Echols v. FEC, No. 02-633: Emily Echols, Hannah McDow, Jessica Mitchell, Daniel Solid, Zachary White, Reverend Patrick Mahoney.

Chamber of Commerce v. FEC, No. 02-751: Chamber of Commerce of the United States, U.S. Chamber Political Action Committee, National Association of Manufacturers, National Association of Wholesaler-Distributors (withdrawn).

National Ass'n of Broadcasters v. FEC, No. 02-753: National Association of Broadcasters.

AFL-CIO v. FEC, No. 02-754: AFL-CIO, AFL-CIO Committee on Political Education and Political Contributions.

Paul v. FEC, No. 02-781: United States Representative Ron Paul, Gun Owners of America, Inc., Gun Owners of America Political Victory Fund, Realcampaignreform.org, Citizens United, Citizens United Political Victory Fund, Michael Cloud, Clara Howell.

Adams v. FEC, No. 02-877: Victoria Jackson Gray Adams, Carrie Bolton, Cynthia Brown, Derek Cressman, Victoria Fitzgerald, Anurada Joshi, Peter Kostmayer, Nancy Russell, Kate Seely-Kirk, Rose Taylor, Stephanie Wilson, California Public Interest Research Group ("PIRG"), Massachusetts PIRG, New Jersey PIRG, United States PIRG, The Fannie Lou Hamer Project, Association of Community Organizers for Reform Now.

Thompson v. FEC, No. 02-881: United States Representatives Bennie Thompson and Earl Hilliard.

Appellee Federal Election Commission ("FEC") was a defendant below, together with the Federal Communications Commission; Attorney General of the United States John Ashcroft; the United States of America; and FEC Commissioners David Mason, Karl Sandstrom (since replaced by Ellen Weintraub), Danny McDonald, Bradley Smith, Scott Thomas, and Darryl Wold (since replaced by Michael Toner). Appellees United States Department of Justice ("DOJ"), United States Senators John McCain, Russell Feingold, Olympia Snowe, and James Jeffords, and United States Representatives Martin Meehan and Christopher Shays were defendant-intervenors below.

STATEMENT PURSUANT TO RULE 29.6

None of the appellants has a parent corporation, and no publicly held company owns ten percent or more of the stock of any of the appellants.

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INTRODUCTION

BCRA profoundly impairs the ability of political parties to participate in the electoral process at the local, state, and national level by, to cite just a few examples:

- Making it a felony for the Chairman of the RNC (or the Democratic National Committee) to send a fundraising letter on behalf of his party's Mississippi gubernatorial candidate in this November's off-year election – even though there are no federal candidates on the ballot this year, any donation would go to the candidate (not the party), and the donation is fully regulated by state (not federal) law;

- Prohibiting the California parties from donating even federally-regulated money to political action committees formed to support or oppose the current effort to recall California's Governor;

- Subjecting to pervasive federal regulation voter registration and get-out-the-vote ("GOTV") efforts by state and local political parties – even when those efforts name only state or local candidates or ballot measures – just because those efforts occur during a federal election year;

- Criminalizing the participation of national party personnel in Republican Victory Programs or Democratic Coordinated Campaigns – through which the national, state, and local parties have historically worked together to design, fund, and implement statewide voter mobilization programs – even during years when no federal elections are held.

Though touted as a statute that would "put the national parties entirely out of the soft money business," 148 Cong. Rec. H408 (2002) (stmt. of Rep. Shays), BCRA does more – much more – than limit the types of money local, state, and national parties may receive. Its numerous collateral restrictions fundamentally alter the way political parties function. The district court held, and the extensive record below proves, that the pervasive restrictions imposed by Title I of BCRA on political party speech and association violate the First Amendment. The court found *no* evidence of *quid pro quo* corruption resulting from donations of nonfederal funds to political parties, and insufficient evidence to prove that most of the activities regulated or prohibited by BCRA posed any threat of corruption to federal officeholders. Thus, BCRA's restrictions are not necessary to alleviate any material risk of corruption or even the "appearance of corruption" of federal candidates and officeholders, and they are neither "narrowly tailored" nor even "closely drawn." Indeed, the restrictions in BCRA's centerpiece national party "soft money ban" are categorical, with no exceptions, reflecting no drawing or tailoring at all.

Although the district court was not required to decide the issue, Congress also acted beyond the scope of its enumerated powers in Article I, Section 4, and ignored principles of federalism, by overriding the authority of the sovereign states to regulate their own elections.

Finally, although once more the district court did not decide it, Title I imposes far more draconian restrictions on political parties than on special interest groups, depriving parties of equal protection guaranteed by the First and the Fifth Amendments.

Campaign finance restrictions represent a "narrow exception" to treasured constitutional guarantees, not – as reform advocates would have it – the highest good. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S.

290, 296-97 (1981). Although the Government seeks to justify BCRA as a broad new "prophylactic" regime innocently intended to plug loopholes, here "[w]e are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct." *FEC v. National Conservative Pol. Action Comm.*, 470 U.S. 480, 501 (1985) ("*NCPAC*").

OPINIONS BELOW

The opinions of the district court are reported at 251 F.Supp.2d 176 (D.D.C. 2003), and are reprinted in the Joint Supplemental Appendix to Jurisdictional Statements.

JURISDICTION

The decision below was entered on May 2, 2003, by a three-judge court convened pursuant to 28 U.S.C. § 2284 and Section 403(a)(1) of BCRA.[2] The RNC Appellants filed their Notice of Appeal on May 7, and their Jurisdictional Statement on May 27. The California Party Appellants filed their Notice of Appeal on May 12, and their Jurisdictional Statement on May 30. The LNC filed its Notice of Appeal on May 8, and its Jurisdictional Statement on May 28. The jurisdiction of this Court rests on 28 U.S.C. § 1253 and Section 403(a)(3) of BCRA. This Court noted probable jurisdiction on June 5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

BCRA is reprinted, along with pertinent parts of Article I, Section 4 of the United States Constitution, and the

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[2] BCRA adds new sections to the Federal Election Campaign Act ("FECA"), 2 U.S.C. §431 *et seq.* This brief refers either to sections of BCRA (*e.g.*, "Section 101(a)") or to the new FECA provisions (*e.g.*, "new Section 323(a)").

First, Fifth, and Tenth Amendments, in the RNC Appellants' Jurisdictional Statement at pp. 1-2 and App. 3a-76a.

STATEMENT OF THE CASE

A. The Statute. The "centerpiece" of BCRA is Section 101(a), which creates new Section 323 of FECA. 147 Cong. Rec. S2444 (March 19, 2001) (stmt. of Sen. Feingold). New Section **323(a)** categorically prohibits national party committees and their agents from "solicit[ing]," "receiv[ing]," "transfer[ring]," "direct[ing]," or "spend[ing]" any funds that are not subject to FECA's restrictions. This is the core of the ban on so-called "soft money," or more accurately "nonfederal money."[3] *There are no exceptions to new Section 323(a)'s blanket prohibition.*

New Section **323(b)** pertains to state and local political party committees. It subjects to full federal regulation all party building programs such as voter registration and GOTV that previously were "allocated" between federal and nonfederal accounts according to the percentage of federal and nonfederal candidates on the ballot.

In contrast to new Section 323(a)'s flat ban on national party involvement with nonfederal money, new Section 323(b) creates a maze of regulatory complexity. In general, new Section **323(b)(1)** prohibits state and local political parties from spending any state-regulated money for what the statute calls "Federal election activity." Federal election activity, in turn, is broadly defined by the Act to

[3] "Soft money" is an imprecise term, but in general is used to refer to funds that are regulated by *state* campaign finance statutes. "Hard money," by contrast, is regulated by FECA. Because, as the FEC itself has recognized, the "soft money" label is inherently misleading, this brief follows the FEC's and district court's lead by referring to "federal" and "nonfederal" (or, alternatively, "state-regulated") money. *See* 67 Fed. Reg. 49064, 49064-65 (July 29, 2002); *Per Curiam* 31sa n.9 (Kollar-Kotelly, Leon, JJ.); Henderson 182-183sa n.30.

include: (i) all voter registration conducted within 120 days of a federal election, whether or not any registration activity refers to a federal candidate; (ii) voter identification, GOTV, and generic party-promotion activity conducted "in connection with" any election in which a federal candidate appears on the ballot, again whether or not the activity mentions a federal candidate; (iii) any "public communication" that "refers" to a clearly identified candidate for federal office and "promotes," "supports," "attacks," or "opposes" a candidate for that office; and (iv) the full salary and benefits of any party employee who spends more than 25 percent of his or her time in connection with a federal election. *See* new §301(20)(A).

New Section **323(b)(2)** – commonly referred to as the "Levin Amendment" – carves out an exception to new Section 323(b)(1)'s general rule. New Section 323(b)(2) creates a new category of federally-regulated nonfederal money called "Levin money." State and local parties may use an FEC-specified percentage of Levin money mixed with federal money for voter registration, voter identification, and GOTV activities, *provided that* certain specified conditions are met: (i) the permitted activities may not refer to a clearly identified federal candidate; (ii) those activities may not involve any broadcast communication except those that refer solely to clearly identified state or local candidates; (iii) no single donor may donate more than $10,000 to a state or local party annually for those activities; and (iv) all money (federal and Levin money alike) spent on such activities must be "*homegrown*" – *i.e.*, raised by the state or local party that spends it – and may not be transferred from or even raised in conjunction with any national party committee, federal officeholder or candidate, or other state or local party. *See* new §§323(b)(2)(B), 323(b)(2)(C).

New Section **323(c)** requires national, state, and local parties to use only federally-regulated money to raise any money that will be used on Federal election activities.

New Section **323(d)** prohibits any political party committee – national, state, or local – or its agents from "solicit[ing]" funds for or "mak[ing] or direct[ing]" any donations of federal or nonfederal money to either: (i) any tax-exempt Internal Revenue Code Section 501(c) organization that spends any money "in connection with an election for Federal office"; or (ii) any IRC Section 527 organization other than a party committee or a candidate committee.

New Section **323(e)** generally prohibits federal officeholders and candidates from soliciting, receiving, directing, or spending any nonfederal money. There are, however, several exceptions. These exceptions are quite telling. *First*, a federal officeholder or candidate (but *not* an agent of a national party committee) may solicit nonfederal money for state and local candidates from sources and in amounts that would be allowed by Federal law. *See* new §323(e)(1)(B). *Second*, a federal officeholder or candidate (but *not* an agent of a national party committee) may attend or speak at a fundraising event for a state or local political party. *See* new §323(e)(3). *Third*, a federal officeholder or candidate (but, again, *not* an agent of a national party committee) may solicit nonfederal funds on behalf of any tax-exempt Section 501 organization that spends money in connection with federal elections in either of two instances: (i) he or she may solicit *unlimited funds from any source* for a Section 501 organization (such as the NAACP or the National Rifle Association) whose "principal purpose" is *not* voter registration, voter identification, or GOTV activity, so long as the solicitation does not specify how the funds will be spent; and (ii) he or she may solicit up to $20,000 per individual per year *specifically for* voter registration, voter

identification, or GOTV activity, *or* for an organization whose "principal purpose" *is* to conduct any or all of those activities. *See* new §323(e)(4).

Finally, new Section **323(f)** generally prohibits state officeholders or candidates from spending nonfederal money on any public communication, even in the course of a state campaign, that "refers" to a clearly identified candidate for federal office and "promotes," "supports," "attacks," or "opposes" that candidate.

B. Proceedings Below. The day BCRA was signed, multiple plaintiffs filed actions in the U.S. District Court for the District of Columbia seeking declaratory and injunctive relief. A three-judge court consolidated the pending cases and determined that it would conduct a "paper trial," foregoing live testimony. It established an expedited schedule for discovery, submission of written testimony, out-of-court deposition-style cross-examination of witnesses, and expedited briefing. After two days of oral argument on December 5-6, the court issued its decision on May 2, 2003.

C. The Factual Record. From the extensive evidentiary record below, the following facts were found by at least two judges (unless otherwise indicated) and thus constitute the district court's findings: [4]

The Importance of Political Parties in American Democracy. As this Court has recently emphasized, "[t]he formation of national political parties was almost concurrent with the formation of the Republic itself." *California*

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[4] Findings of fact common to two or more judges comprise findings of the district court. *See Wright v. Rockefeller*, 376 U.S. 52, 56 (1964) (relying on findings of fact of majority of three-judge court, even though the three judges issued separate opinions). Such findings are entitled to deference by this Court unless deemed clearly erroneous. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

Democratic Party v. Jones, 530 U.S. 567, 574 (2000). Parties play an "important and legitimate role . . . in American elections." *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) ("*Colorado I*"). "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together [in parties] in promoting among the electorate candidates who espouse their political views." *California Democratic Party*, 530 U.S. at 574.

As the district court found, based on the testimony of the RNC's senior political science expert, Dr. Sidney Milkis (James Hart Professor of Politics at the University of Virginia), its expert historian, Dr. Morton Keller (Emeritus Professor of American History at Brandeis University), and the Government's and Intervenors' own experts, political parties have played four vital roles in maintaining a stable constitutional order. *First*, "parties have coordinated and reconciled various national, state, and local entities within our federal system of government." Leon 1195sa; *see also* Henderson 292-93sa.

Second, "parties [have] encourag[ed] a 'democratic nationalism' by nominating and electing candidates and by engaging in discussions about public policy issues of national importance." Henderson 293sa; *see also* Leon 1195sa.

Third, "parties act as critical agents in developing *consensus* in the United States." Henderson 294sa (emphasis added); *see also* Leon 1196sa. Political parties are "the main coalition building institution[s] . . . by a good measure," Henderson 294sa (*quoting* defense expert Green CX 84); Leon 1196sa (same). "No other group could come close to political parties" in moderating extreme views. Henderson 294sa; *see also* Leon 1196sa (same).

Finally, and relatedly, political scientists "credit parties with . . . diluting the influence of organized interests."

Henderson 293sa; *see also* Leon 1195sa. "[P]arties have been the most important institutions to cultivate a sense of community, of collective responsibility in a political culture principally dedicated to individualism, privacy, and rights." Henderson 294sa; *see also* Leon 1196sa.

The Use of Federal and Nonfederal Money by Political Parties. Political parties use money regulated by FECA ("federal money") to make contributions to federal candidates and for campaign expenditures that expressly advocate a particular federal candidate's election or defeat. *See* Henderson 295sa; Leon 1198sa. Before BCRA, parties used state-regulated ("nonfederal") money, *inter alia*, to make contributions to, and expenditures on behalf of, state and local candidates and ballot measure committees. *See* Henderson 297-99sa; Leon 1212-15sa.

Shortly after enactment of FECA, the FEC recognized that our federal system of government required that parties be free to raise and spend nonfederal money. *See* FEC Advisory Op. No. 1978-10 ("The costs allocable to non-Federal elections may be paid out of Party funds raised and expended pursuant to applicable [state] law."). Indeed, the FEC acknowledged that nonfederal, or "soft," money is a byproduct of our federal system:

> The origins of "soft money" lie in the United States' federal system of government. The Constitution grants each state the right to regulate certain activities within that state. In the area of campaign finance, each state may establish its own rules for financing the nonfederal elections held within its borders. As a result, committees that support both federal and nonfederal candidates frequently must adhere to two different sets of campaign finance rules – federal and state.

J.A. 1820-21, FEC, Twenty Year Report, Ch. 3, p. 4 (April 1995).

Certain party activities are neither exclusively federal nor exclusively nonfederal. In an effort to reconcile the competing federal and state regulatory interests, the FEC adopted "allocation regulations" to govern such "mixed" federal-state activities as full-ticket voter mobilization, communications with party supporters, certain advertising, and administrative overhead. *See* 11 C.F.R. § 106.5 (2002); Henderson 299sa; Leon 1218-19sa. Accordingly, for instance, FEC rules required the RNC and the DNC to fund these mixed activities with at least 65% federal money during presidential election years and 60% during other years. *See* Henderson 299-300sa; Leon 1218-19sa. Each national party maintained numerous nonfederal accounts tailored to these varying state laws. Because many states allow contributions from corporations and unions, and impose varying dollar limits (or no limits at all), the national party committees could accept unlimited individual, corporate, and union donations to certain of their nonfederal accounts. Before BCRA, national parties disclosed to the FEC all receipts and disbursements of nonfederal money. *See* 11 C.F.R. § 104.8(e) (2002). New Section 323(a) now requires national political parties to fund *all* of their local, state, federal, and mixed activities with 100% federally-regulated money. There are no exceptions.

Also before BCRA, state parties were required to allocate federal and nonfederal money to mixed activities, but did so based in part on the ratio of federal to state and local candidates on the ballot. *See* Henderson 309-10sa; Leon 1226sa. Because a typical ballot has many more state and local than federal candidates, state party allocation ratios frequently required a lower percentage of federal money than national party ratios. *See* Henderson 311sa; Leon 1227-28sa. State party activities relating to state and local candidates and initiatives were subject to neither the federal allocation

regulations nor the federal reporting requirements. Title I of BCRA now subjects all of these state party "mixed" activities – as well as a substantial amount of activity directed toward state and local elections – to the federal regime.

The RNC and Its Activities. The RNC is governed by its members, who include the state party chairman, one committeeman, and one committeewoman drawn from each of the 50 states, D.C., and the territories. *See* Henderson 223-24sa; J.A. 1878-1926, RNC Ex. 1 ("The Rules of the Republican Party"); J.A. 291-92, Josefiak Decl. ¶15. The RNC is not a *federal* party; it is a *national* party. It participates extensively in state and local, as well as federal, elections. *See* Henderson 294-95sa; Leon 1197sa.

- The RNC's participation in state and local elections is perhaps most evident in odd-numbered years (*e.g.*, 2001, 2003), when no federal candidates appear on the ballot. Five states (Kentucky, Louisiana, Mississippi, New Jersey, and Virginia) hold all their elections for state and local office in odd-numbered years. Nearly every state holds at least some local elections in odd-numbered years,[5] including mayoral elections in major cities such as New York, Los Angeles, Houston, Minneapolis, and Indianapolis. *See* Henderson 298sa; Leon 1213sa.

As the district court unanimously found, in 2001, when there were no federal candidates on the ballot, the RNC spent more than $15.6 million of state-regulated money on state and local election activity, including contributions to state and local candidates, transfers to state parties, and direct spending. *See* Henderson 298sa; Kollar-Kotelly 536-37sa; Leon 1213sa. Over and above this direct spending, the RNC

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[5] *See* U.S. Conf. Mayors, 2003 Mayoral Election Schedule, *available at* http://www.usmayors.org/uscm/elections/electioncitiesfall2003.pdf (visited on May 29, 2003) (46 states with mayoral elections in 2003).

also devoted considerable "in-house" efforts to the Virginia and New Jersey gubernatorial and state legislative races in 2001, committing staff and other resources to those campaigns. *See* J.A. 301-04, Josefiak Decl. ¶45-55. The costs of these in-house resources were paid, under pre-BCRA law, as part of the RNC's administrative overhead with a "mix" of federal and nonfederal funds. *See id.* ¶31, J.A. 296.[6]

Significantly, the district court found that the RNC engages in the same activities on behalf of state and local candidates even when federal candidates appear on the ballot. *See* Henderson 297sa; Leon 1212-13sa. In 2000, for instance, the RNC made approximately $5.6 million in direct contributions to state and local candidates. *See* Henderson 297sa; Leon 1212sa; J.A. 305, Josefiak Decl. ¶61. In federal election years, the bulk of the RNC's efforts are conducted in coordination with state parties and focus on full-ticket activities such as voter registration, voter identification, and GOTV efforts intended to aid all Republican candidates. Notably, even when federal races are not competitive in a state – as in Indiana in 2000 or California in 2002 – the RNC often devotes substantial resources to these programs. *See* Henderson 297sa; Leon 1212sa; J.A. 306, Josefiak Decl. ¶62; J.A. 695, Peschong Decl. ¶8.

BCRA's sponsors repeatedly testified that political party broadcast issue advertisements, which mentioned but did not expressly advocate the election or defeat of a federal candidate, and which were paid for with a mix of federal and nonfederal money, were the object of their concern. *See,*

[6] Although there are no federal candidates on the ballot in November 2003, three states (Kentucky, Louisiana, and Mississippi) are holding elections for state-wide office, and dozens of others are electing local officials. BCRA prohibits the RNC from raising or spending any nonfederal money in these state and local elections.

e.g., J.A. 944, McCain Dep. 193 ("It's the broadcast television and radio ads that we believe are what is the problem."); J.A. 991-93, Shays Dep. 40-43; J.A. 975-76, Meehan Dep. 218-19; J.A. 1025-1026, Snowe Dep. 159-60; J.A. 916-17, Jeffords Dep. 83-85. Significantly, however, of the approximately $120 million in nonfederal money raised by the RNC in the 2000 cycle, *see* J.A. 336, Knopp Decl. ¶7, only $43.6 million (36%) was used for such advertisements, either directly or through state parties. *See* Henderson 300sa; J.A. 36, Banning Decl. ¶25. The remaining 64% of the RNC's nonfederal funds were used for administrative overhead (30%), J.A. 37, Banning Decl. ¶27, and other vital activities.

RNC Fundraising Activities. Contrary to popular misconception, the RNC historically raised 60% of its total funding in the form of small donations through direct mail, telephone banks, and Internet solicitations. *See* Henderson 307sa; Leon 1224sa; J.A. 335, 336-37, Knopp Decl. ¶¶5, 8. Of course, the RNC also had "major donor" programs, to raise both federal and nonfederal money, and both federal and nonfederal donors were invited to dinners and meetings at which federal officeholders and party officials spoke. *See* Henderson 307-08sa; Leon 1224-25sa; J.A. 753-54, Shea Decl. ¶14.

Also contrary to popular misconception, the RNC raised the bulk of its nonfederal money from individuals, not corporations. *See* Henderson 308sa; Leon 1225sa; J.A. 337, Knopp Decl. ¶9 (for 2000 cycle, $65 million nonfederal from individuals; $51 million from corporations). Indeed, every year from 1997 through 2001, the average corporate nonfederal donation ($2,226 in 2000) was significantly lower than the average individual donation ($10,410 in 2000). *See* Henderson 308sa; Leon 1225sa; J.A. 337, Knopp Decl. ¶9.

Finally, and again contrary to popular misconception, RNC reliance on federal officeholders for personal or

telephonic solicitation of major donors was "exceedingly rare." Henderson 308sa; Leon 1245sa; J.A. 756-57, Shea Decl. ¶ 17.

RNC Financial Assistance To State Parties. The RNC has a "brand name," professional staff, nationwide presence, and economies of scale that state parties cannot replicate. *See* J.A. 765, Shea Decl. ¶41. Accordingly, the RNC made transfers to state and local parties of approximately $129 million ($35.8 million federal, $93.2 million nonfederal) during the 2000 cycle. *See* Henderson 302-03sa; Leon 1219sa.

The RNC also provided fundraising assistance to state and local parties to help them raise their own funds directly. For example, from January to October 2002, before BCRA took effect, RNC Chairman Marc Racicot made 82 trips to a total of 67 cities in 36 states; the RNC's Co-Chairman and Deputy Chairman were also well-traveled. The majority of these trips involved fundraising efforts on behalf of state and local parties and candidates. *See* Henderson 303-04sa; Leon 1220sa; J.A. 309, Josefiak Decl. ¶70. The RNC also conducted direct mail fundraising for state and local candidates. *See* Henderson 303sa; Leon 1220sa; J.A. 1926-28, 1929-30, RNC Exs. 232, 292 (examples of fundraising letters sent by RNC officers on behalf of gubernatorial and mayoral candidates). Since every dime raised and spent by state candidates is state-regulated money, these fundraising efforts for state and local candidates raised *non-federal money*, often in small denominations, that generally flowed directly to the state candidate or party, *not* to the RNC. *See* J.A. 300-301, Josefiak Decl. ¶44.

Activities of State and Local Parties. The CDP and CRP together represent over 12 million members.[7] Their activities are governed primarily by state law, which provides for the state parties themselves (governed by a State Central Committee), along with 58 County Central Committees for each party and a larger number of local Assembly District Committees.[8] *See generally* CAL. ELEC. CODE §§ 7050 *et seq.* Various provisions of state law as well as party bylaws provide for overlapping membership between the State Central Committees and County Central Committees, and these organizations also automatically include each party's state and national officeholders and candidates and the California members of each party's national committee (the DNC and RNC). *See* J.A. 115-16, Bowler Decl. ¶¶3-4; J.A. 600, Morgan Decl. ¶8.

Since 1974, California has extensively regulated campaign activities, including those of candidates and political parties. Like most states, it has made a deliberate policy choice about the regulation of contributions to its political parties for use in connection with its state and local elections.[9] Like federal law, California law provides for

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[7] Appellants in No. 02-1727 include the Republican Parties of Colorado, New Mexico, and Ohio and the Dallas County (Iowa) Republican County Central Committee.

[8] Appellants Yolo County Democratic Central Committee and Santa Cruz County Republican Central Committee are two of the County Central Committees.

[9] For example, New York chose to allow limited corporate contributions in connection with state elections. This and other related campaign finance "reforms" "represent[ed] the product of a successful, bi-partisan, Executive and Legislative effort to develop and distill an election law reform program that can and will substantially bolster voter confidence in the electoral process." 1974 N.Y. ST. LEGIS. ANN. 395. Likewise, Utah decided not to restrict corporate contributions at all, explicitly rejecting a proposal to "review federal laws on the financing of election campaigns to determine whether any of those laws and regulations could be used in (continued...)

disclosure of campaign contributions and expenditures. Unlike federal law, California law allows contributions by both unions and corporations. *See* CAL. GOV. CODE § 81000 *et seq*.

California's campaign finance regime was significantly amended in November 2000, when "Proposition 34" was adopted by the state's voters. The new law imposes limits on contributions to candidates and offers certain benefits to candidates in exchange for voluntarily accepting spending limits.[10] *See* CAL. GOV. CODE § 85300 *et seq*. At the same time, however, the parties are allowed to raise and spend more money, not less, in connection with state and local elections. Limits for contributions to the parties for candidate-related expenditures are set at $26,600 per year. Contributions for non-candidate-specific expenditures (such as administrative expenses, generic party-building, voter registration, partisan GOTV and ballot measure activities) are unlimited. *See* CAL. GOV. CODE § 85303(c). As the district court found, Proposition 34 reflected a specific policy choice by the voters to allow unlimited contributions to the parties based on the view that "[p]olitical parties play an important role in the American political process and help insulate candidates from the potential corrupting influence of large contributions." Henderson 310-11sa (*quoting* California Ballot Pamphlet); Leon 1227sa.

Utah," H.B. 328, 54th Gen. Assem. (UTAH 2001), and another "urging reform of Federal Campaign Finance Law" as embodied in the then-pending BCRA. *See* S. Res. 2, 52nd Gen. Assem. (UTAH 1998).

[10] California limits contributions by persons other than political parties and "small contributor committees" to $3,200 per election for state legislative candidates, $5,300 per election for statewide candidates, and $21,200 per election for gubernatorial candidates. *See* CAL. GOV. CODE §§ 85301-85303. (These numbers are slightly higher than in the briefs below because contribution limits are indexed for inflation. *Id.* § 83124.)

The district court found that while state parties play a role in federal elections, they do not exist primarily for that purpose. State and local parties exist primarily to participate in state and local elections, which substantially outnumber federal races, and state and local parties focus the majority of their resources on these elections. In particular, voter registration and GOTV activity such as direct mail, telephone banks, and door-to-door canvassing are all primarily directed at state and local elections. *See* Henderson 311-14sa; Leon 1227- 31sa.

The state and local parties currently organize and conduct most of the grass-roots campaign activities. Candidates generally have neither the money nor the infrastructure to conduct these activities; they typically use the media or mail because these methods are more cost-effective given the size of California's districts.[11] *See* J.A. 124-30, Bowler Decl. ¶20; J.A. 225, 234-35, Erwin Decl. ¶¶3, 8. State and local parties organize and support local party headquarters with paid staff to recruit, train, and coordinate volunteers during election season.

Significantly, the district court rejected the suggestion that state parties received most or all of their nonfederal funds from national party transfers for use on issue advertisements. It found that a substantial majority of the non-federal funds of CDP and CRP are the result of their own direct fundraising in conjunction with state and local

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[11] State Senate Districts (almost 850,000 persons) are larger than Congressional Districts (approximately 640,000 persons). *See* http://swdb.berkeley.edu./info/census2000/P001_by_2kDistrict.html. A State Assembly District contains approximately 423,000 persons. *See id.* In addition to 120 state legislators, Californians vote on eight statewide officers, as well as local and judicial officers and ballot measures. *See* J.A. 118, Bowler Decl. ¶8.

candidates and activities. *See* Henderson 315-17sa; Leon 1239-40sa. Nonfederal funds raised directly by each of the California state parties in the past several cycles have ranged from approximately $10 million per cycle to $17 million per cycle. *See* Henderson 316-17sa; Leon 1241sa.

Moreover, although national parties have transferred money to state parties for use in issue advertisements, the evidence shows that many state parties spend the majority of their nonfederal money (including transfers from the national parties) on administrative overhead, grass-roots mobilization, and other party-building activities, and not on issue advertisements. *See* J.A. 1434-37, La Raja Decl. ¶22. If transfers are excluded, the percentage of nonfederal funds spent by the state and local parties on overhead and mobilization activities is even higher. *See* Leon 1121-22sa & n.58.[12]

The district court found that the state parties, unlike the national parties, have raised fairly consistent amounts of federal funds over the past several cycles, and that they are not likely to raise significantly more federal funds because the cost of doing so is extremely high. *See* Henderson 315sa, 317sa; Leon 1240-41sa.

In addition, although the state parties have raised far more nonfederal funds than federal funds, the Levin Amendment prohibits state parties from using most of their state-regulated money for state and local election activities

[12] The Government and its experts have repeatedly made assertions about spending by state parties based on data concerning state party "allocation" accounts (which reflect, almost by definition, expenditures for largely "generic" or "mixed" activities, including issue advertising). These accounts do not, however, include the state parties' disbursements on purely state and local activities, such as mailings for state candidates. The Government's failure to include data on these purely state and local activities produces a distorted picture.

that fall within the definition of "Federal election activity." Over the past several cycles, contributions comprising 76%-86% of CDP's nonfederal revenue – $10-13 million per cycle – exceeded the $10,000 limit imposed by the Levin Amendment. *See* Henderson 316sa; Leon 1241sa; J.A. 144-52, Bowler Decl. Exh. A; J.A. 162-63, Bowler Reb. Decl. ¶4; *see also* J.A. 250-51, Erwin Decl. ¶15a (comparable figures for CRP are $12 million in Presidential cycles, and $3.5 million in non-Presidential cycles). Since BCRA imposes its strictures on all voter mobilization activity during federal election years, the effect is severe. Voter registration, generic party-building, and grassroots mobilization are likely to be reduced. *See* Henderson 321sa; Leon 1242-43sa.

Collaboration by local, state, and national parties on Republican "Victory Plans" and Democratic "Coordinated Campaigns." Relations among local, state, and national party organizations have strengthened in the past three decades, and have never been closer. This is generally healthy for American democracy. *See* Henderson 304sa; Leon 1221-22sa. This close working relationship is exemplified by Republican "Victory Plans" and Democratic "Coordinated Campaigns." As Senator McCain acknowledged, these "grass roots activities are the fundamentals of a democratic process." J.A. 943-44, McCain Dep. 192-93.

Before BCRA, at the outset of each election year, each state Republican party worked with the RNC to prepare and implement a written "Victory Plan" containing its strategy for identifying, contacting, and mobilizing voters for that election cycle. The plan included numerous components such as direct mailings, telephone banks, brochures, slate cards, yard signs, and rallies, and was funded with a mix of federal and nonfederal money. *See* Henderson 306sa; Leon 1223sa; J.A. 694, Peschong Decl. ¶4. The plan also set forth the budget for the programs, a strategy for raising the money, and an allocation of the financial burden among the local,

state, and national parties. It often placed its greatest emphasis on state and local races. *See* Henderson 306sa; Leon 1223sa.

From the outset, RNC officials assisted the state party in drafting and implementing each plan. *See* Henderson 305-06sa; Leon 1222sa; J.A. 694-95, Peschong Decl. ¶¶5-7. In addition to the technical expertise the RNC brought to the Victory Plan process, the RNC provided funding for these programs – $42 million in 2000, 60% of which was nonfederal – and provided fundraising assistance to the state parties to help them raise their share. *See* Henderson 306sa; Leon 1223sa; J.A. 296, 306, Josefiak Decl. ¶¶31, 63. *None* of this money was used for issue advertising. *See* Henderson 306sa; Leon 1223sa. Similar activities were undertaken by local, state, and national Democratic party committees in their Coordinated Campaigns, *see* Henderson 305sa; Leon 1222sa, through which they "register[ed], identif[ied], and turn[ed] out voters on behalf of the entire Democratic ticket." J.A. 823-24, Stoltz Decl. ¶3.

The LNC and Its Activities. The Libertarian National Committee, Inc. ("LNC"), the governing body of the *Libertarian Party*® at the national level, is incorporated in the District of Columbia as a nonprofit corporation governed by IRC § 527. It advances the principle that all individuals have the right to exercise sole dominion over their lives and have the right to live in whatever manner they choose, so long as they do not forcibly interfere with the equal right of others to live in whatever manner they choose. *See* J.A. 181-82, Decl. of Dasbach, Crickenberger, and Dunbar of the LNC ("LNC Decl.") ¶4.[13]

[13] In addition to their specific objections to BCRA, the LNC and Libertarian Party oppose all federal campaign finance laws; the LNC does not seek, accept, or use any government funds for election campaigns. *See* LNC Decl. ¶4, J.A. 181-82.

The Libertarian Party is a membership organization with dues paid by all members, including minors. *See id.* ¶45, J.A. 199-200. Dues often are paid to affiliated state Libertarian parties, with a portion distributed to the LNC, so that those who pay dues may be members of both the state and national parties. The Libertarian Party permits one person to pay dues on behalf of another, in which case the dues are placed in state affiliate nonfederal money accounts. *See id.* ¶33, J.A. 195.

The LNC engages in a wide range of activities to increase acceptance of libertarian principles, many of which are unrelated to federal elections. It solicits, receives, and uses nonfederal money (as well as federal money) to advocate libertarian positions on public policy issues such as drug policy or taxation. *Id.* ¶¶15, 35, J.A. 187-88, 196. The LNC conducts issue advocacy campaigns and develops educational materials unrelated to election campaigns and without any express reference to Libertarian Party federal candidates. *See id.* ¶¶12, 35, J.A. 186, 196. The LNC also produces educational materials on libertarian issues for sale to the general public and to state and local Libertarian Parties and candidates. *See id.* ¶32, J.A. 194-95.

The LNC stages conventions of the Libertarian Party every other year, with nominating conventions during presidential election years and educational conventions during other election years. *See id.* ¶28, J.A. 192. Conventions held during non-presidential election years are devoted solely to discussion and advocacy of issues and internal LNC party matters; no candidates for public office are nominated or selected. *See id.* ¶29, J.A. 192-93. The LNC finances the conventions through attendance fees (including fees from minors) and, in significant part, through space rentals, advertising in convention programs, and sponsorships of the program and various events by individuals and corporations. *See id.* ¶29.

The LNC also publishes a newspaper, the *Libertarian Party® News,* each month – regardless of whether an election is pending. The newspaper accepts advertising from for-profit and not-for-profit corporations and from state and local candidates. *See id.* ¶¶18-19, J.A. 189. As with the party dues structure, the newspaper accepts funds for subscriptions for one person on behalf of another. *See id.* ¶21, J.A. 189-90.

The LNC transfers nonfederal funds to affiliated state parties. *See id.* ¶¶15-16, J.A. 187-88. Only seven of the 51 state affiliates of the national Libertarian Party have registered as political committees with the FEC and are subject to FECA requirements. *See id.* ¶9, J.A. 184.

Even Libertarian Party federal campaigns are primarily focused on federal issue advocacy, because no Libertarian Party candidate has ever been elected to federal office. *See id.*, ¶10, J.A. 185. Knowing they have little prospect of winning, Libertarian Party federal candidates use their candidacies to educate the public on libertarian principles. *See id.* ¶11, J.A. 185-86. For the same reasons, the LNC supports its party candidates as a means to foster support for libertarian principles, not to elect candidates to federal office.

The LNC makes both independent and coordinated expenditures on behalf of candidates for state and federal office, and it transfers funds between national, state, and local party committees; it uses nonfederal money to finance its ballot access drives and to finance all of its national conventions; it solicits funds for and makes donations to IRC § 527 organizations; and it solicits funds for and makes donations to IRC § 501(c) organizations that make expenditures in connection with federal elections. *See id.* ¶¶16, 37, 39, J.A. 188, 196-97.

BCRA will wreak havoc on the structure and nonfederal political activity of the LNC and its affiliated state parties. BCRA prohibits the current LNC dues and newspaper subscription structure. Further, it requires the LNC to fund all activities with 100 percent federal dollars. At present, the LNC has three principal sources of nonfederal money: 1) list rental fees ($39,558 in 2001); 2) dues paid through state affiliates and forwarded from the state affiliates to the LNC ($75,239.77 in 2001); and 3) advertising in the *Libertarian Party® News* and elsewhere ($61,530.25 in 2001). *Id.* ¶9, J.A. 184. In 2002, only one individual contribution to the LNC exceeded the $20,000 FECA limit; during the past six years, no more than four donors to the LNC have exceeded this limit in any one year. *Id.*

The LNC is subject to all the same burdens imposed by BCRA as major parties. But the restraints that BCRA imposes on the far smaller LNC weigh even more heavily on its freedom to advocate issues and to associate with others toward a common purpose. The primary effect of BCRA on the LNC is thus to impede LNC issue advocacy and freedom of association with little or no potential to serve any interest in preventing actual or apparent corruption.

The Rise of Special Interest Groups. Throughout American history, single-issue interest groups have populated American politics. Parties seek to induce these groups into broader coalitions and thereby moderate their often extreme views. In the words of the Government's political science experts, "[p]arties with their necessary 'big tent' compete for the allegiances of multiple groups." Leon 1196sa (*quoting* Krasno & Sorauf Expert Report at 24).

In recent years, special interests have become increasingly well-funded and aggressive competitors of the political parties. Interest group broadcast issue advertising exploded, accounting for fully two-thirds of all such spending. *See* Henderson 230-31sa; Leon 1324-25sa.

Unlike political party issue advertising – which often responded to interest group advertising, was fully reported to the FEC, and was paid for with a mix of federal and nonfederal money – interest group issue advertising has been virtually unregulated. *See* J.A. 314, Josefiak Decl. ¶89. Even under BCRA, interest groups remain free to spend 100% nonfederal funds raised in any amount from any source – without *any* public disclosure – on broadcast issue advocacy so long as the spots are crafted to avoid Title II's definition of "electioneering communications."

Moreover, even before enactment of BCRA, many interest groups already were shifting their focus in the days and weeks preceding an election away from broadcast advertising toward "ground war" activities such as GOTV. *See* Henderson 322-23sa; Leon 1253-54sa; J.A. 697-98, Peschong Decl. ¶¶13-14. These activities are often subject to *no* regulation and *no* disclosure, even under BCRA.

As but one example, the district court unanimously found that during the closing weeks of the 2000 election campaign, the NAACP National Voter Fund spent roughly $10 million – $7 million of which came from one anonymous donor – on election-related activities, including registering 200,000 voters, putting 80 staff in the field, contacting 40,000 people in each of its target cities, operating a GOTV hotline, running newspaper print advertisements on issues, making seven direct mailings, funding affiliated groups, and calling over one million households. *See* Henderson 323sa; Kollar-Kotelly 645sa; Leon 1253-54sa; *see also* Henderson 323sa ($7.5 million GOTV efforts of NARAL); Kollar-Kotelly 645sa (same); Leon 1253-54sa (same). Thus, interest groups "engage in a wide array of political activities paralleling the activities of political parties." Henderson 322sa; *see also* Leon 1253sa.

The Government's experts agreed, and the district court found, that BCRA will encourage *more* interest group

voter-mobilization activity, funded with undisclosed, unregulated money. *See* Henderson 323-24sa; Leon 1253sa; J.A. 861, Green CX 24; J.A. 928-29, Mann CX 164-65. Evidence in the record and, in Judge Henderson's words, "common sense," suggest that BCRA will merely shift nonfederal funds away from political parties to interest groups, which are free to operate below the radar of public scrutiny. *See* Henderson 415sa. NARAL president Kate Michelman, for instance, has said that donors seeking to "elect people who embody their values will be looking to groups like NARAL, which do serious political work and are seasoned operatives, to invest in. If they can't give to the parties . . . they are going to find other means." Henderson 324sa; Kollar-Kotelly 643sa; *see* J.A. 279, Gallagher Decl. ¶61; *see also* J.A. 1438-44, La Raja Decl. ¶24; J.A. 1601-02, Milkis Decl. ¶47; J.A. 928-29, Mann CX 164-65.

Already, media reports have confirmed these predictions. Indeed, as the *Washington Post* reported, "[w]hat appears certain, experts said, is that special interest groups – such as labor unions, abortion rights groups and the National Rifle Association – will use the cash they once sent to the political parties as soft money to air ads and organize voters directly."[14] BCRA does not truly ban "soft money"; it merely pushes it under the table.

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[14] *See* J.A. 1934-37, Thomas B. Edsall & David Von Drehle, *Republicans Have Huge Edge in Campaign Cash*, WASH. POST, Feb. 14, 2003, at A7. The *Washington Post* recently reported on a May 8, 2003, meeting of major interest groups planning to raise nonfederal money for use in funding a massive voter mobilization and issue advocacy campaign. "Most of the groups at the . . . meeting at Emily's List's offices in Washington have special committees . . . that are generally not restricted by McCain-Feingold. Most are competing for large contributions from many of the 'soft money' donors to the Democratic Party." J.A. 1938-41, Thomas B. Edsall, *Liberals Meeting to Set '04 Strategy; Labor, Rights Groups Focus on Getting Out the Vote to Help Democrats*, WASH. POST, May 25, 2003, at A6; *see also* J.A. 1942-45, Harold Meyerson, *Union*

(continued...)

"Corruption" or the "Appearance of Corruption." Eminent historian Dr. Morton Keller of Brandeis testified without contradiction that – in view of an extensive federal, state, and local regulatory regime governing lobbying, gratuities, campaign contributions, and civil service patronage – "'[c]orruption or the appearance of corruption' . . . is less of a problem in American politics today than at any time in the past." J.A. 1261-62, 1267, Keller Decl. ¶55. Defense expert Dr. Frank Sorauf has observed, "the [campaign finance] reform agenda of the 1990s" – of which BCRA is a product – "is driven as much by populist demonologies as it is by the realities of contemporary political influence." Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 Colum. L. Rev. 1348, 1356 (1994). The record here amply bears this out.

Lack of evidence of *quid pro quo* corruption. Based on defendants' binding admissions, the district court found that there is *no* evidence "that any Member of Congress has ever changed his or her vote on any legislation in exchange for a donation of nonfederal funds to his or her political party." Leon 1254sa; *see also* Henderson 325sa; J.A. 1732, FEC Response to Requests for Admission ("RFA") Nos. 1, 2; J.A. 853-54, Feingold Dep. 132-33; J.A. 918-19, Jeffords Dep. 106-07. Moreover, defendants admitted that "[t]here is no probative evidence that national parties have attempted, through the use of nonfederal donations, to get federal officeholders to change their position on legislation." Leon 1261sa; *see also* Henderson 328sa; J.A. 1732, FEC Response

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Dos and Don'ts For the Democrats, WASH. POST, May 28, 2003, at A19 (describing "myriad so-called 527s – the tax code designation for organizations that are springing up now that campaign reform has banned the two parties from collecting soft money to fund voter registration and mobilization campaigns").

to RFA Nos. 23, 24; J.A. 1026-1030, Snowe Dep. 205-08, 231-32; J.A. 974-75, Meehan Dep. 171-72.

Likewise, defense statistical expert Dr. Green admitted there are *no statistically valid studies* showing a correlation between political donations and legislative voting behavior, *see* J.A. 861-64, Green CX 58-61, and the district court agreed. *See* Henderson 326sa, 327sa ("[n]o valid statistical evidence" nonfederal donations influence roll call votes, committee voting, amendments, or filibusters); *see also* Leon 1256sa (any statistical evidence that nonfederal donations resulted in *quid pro quo* corruption has been "so undermined by challenges to its validity that it has no probative value.").

"Access." The record provides no support for the claim that "access" to federal officeholders is *uniquely* granted to nonfederal donors as a result of their donations to political parties. *See* Henderson 330sa; Leon 1263-64sa; J.A. 864-67, Green CX 69-72, 95. Nor is there "probative evidence that federal officeholders are more likely to meet with nonfederal donors than with federal donors." Leon 1264sa; *see also* Henderson 330sa. As the FEC admitted, all six national party committees' fundraising events are open to federal *and* nonfederal donors alike. *See* Henderson 329sa; Leon 1263sa.

Moreover, the district court found that lobbying expenditures are more likely to produce "access" to a federal officeholder than political donations. *See* Henderson 331sa; Leon 1287sa. The amount spent on lobbying by party donors is often "geometrically larger" than their nonfederal donations to parties. Leon 1287sa; *see also* Henderson 332sa. For example, as the FEC admitted, the top five nonfederal donors to parties in 1997-98 donated $7.8 million in nonfederal funds but spent ***$42 million*** on federal lobbying during that same period. *See* Leon 1287sa; Henderson 332sa. Reported lobbying spending in Washington in just the *last six*

months of 2002 was *$925.8 million*. *See* J.A. 1946-47, BNA, Money & Politics Report (June 24, 2003).

Public perception. As its "principal" evidence that nonfederal donations to political parties create the "appearance of corruption,"[15] the Government submitted a specially-commissioned but "poorly worded" public opinion poll by Richard Wirthlin and Mark Mellman. Henderson 334sa. The Wirthlin/Mellman poll asked respondents for their views of "*large*" or "*big*" contributions to parties, without defining those terms. The RNC's public opinion expert, Dr. Q. Whitfield Ayres, precisely replicated the Wirthlin/Mellman poll, substituting *BCRA's new contribution limits* for the words "big" or "large." Dr. Ayres' results almost exactly matched the Wirthlin/Mellman results. As Judge Henderson found, "[e]very conclusion that the Wirthlin-Mellman report reached about 'large' or 'big' contributions and contributors applies with equal force to the new . . . hard money limits in BCRA." *See* Henderson 336-37sa (*quoting* Ayres Reb. at 4-5).

Defendants' Anecdotal Evidence. Defendants can be expected to reiterate a torrent of anecdotes in an effort to show something so seriously flawed within the political system as to justify BCRA's extreme measures. These anecdotes are both legally insufficient and factually

[15] Leon 1289-90sa. The record here shows that when people use the word "corruption," as often as not they are referring to things that are *unpleasant*: negative campaign ads, *see, e.g.*, J.A. 1041-45, Williams CX 21-22, 56-59; intense fundraising efforts, *see, e.g.*, J.A. 974, Meehan Dep. 128; high campaign costs generally, *see, e.g.*, J.A. 1038, Strother CX 38-39; the lack of disclosure and accountability on the part of special interest groups that run issue ads, *see, e.g.*, J.A. 1005-06, Shays CX 65; and even the FEC itself, *see* J.A. 930-32, McCain Dep. at 15-16, 89; *see also* Henderson 337sa. None of these conceptions of "corruption" is a valid basis for government regulation of political parties.

questionable.[16] For example, hearings convened by Senator Fred Thompson in the summer of 1997 focused on the raising of nonfederal funds during the 1996 campaign through "White House coffees," "Lincoln bedroom sleepovers," and donations from foreign sources, as well as the use of such money for issue advertising. Two corporations and 26 individuals were indicted under existing law as a result of that investigation, *see* J.A. 872-76, Green CX Ex. 12, and, in provisions not challenged in this case, BCRA tightens the restrictions on fundraising on federal property and on foreign donations, *see* new §§ 302, 303.

The district court's treatment of defendants' anecdotal evidence mirrored the conclusions of an "Adverse Report" on BCRA issued by the House Committee on Administration:

> No evidence has been produced to this Committee of a "corruption" problem stemming from soft money contributions to political parties. Even if there had been such a showing, H.R. 2356 does not even attempt to be a narrowly tailored remedy. If it were ever to become law, it would have precisely the opposite effect its proponents intend. Rather

[16] As Judge Henderson observed, the evidence of actual or apparent corruption is "mostly anecdotal in nature." Henderson 409sa. Notwithstanding the "mountain of discovery," defendants below identified "not a single discrete instance of *quid pro quo* corruption attributable to the donation of non-federal funds to the national party committees," *id.* 409-10sa, and no empirical evidence of the alleged corrupting effect of non-federal funds donated to parties. *Id.* 410-11sa. The evidence before Congress was no different. *See* 148 Cong. Rec. S2099 (Mar. 20, 2002) (stmt. of Sen. Dodd) ("I have never known of a particular Senator whom I thought cast a ballot because of a contribution."); 145 Cong. Rec. S12586 (Oct. 14, 1999) (stmt. of Sen. McCain) (responding to direct question, Sen. McCain fails to name any Senator who traded a vote for nonfederal funds). *See* Henderson 431sa (rejecting anecdotal accounts from legislative history) (relying on *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000)).

> than diminish the power of 'special interest' groups, it would actually make those groups even more powerful than they are today. Independent advocacy groups, unions and corporations would see their power and influence rise, while our national political parties would be debilitated. The result would be destabilization and factionalism, neither of which is in the best interest of our country.

H.R. Rep. No. 107-131(I), at 2 (2001); *see also United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822 (2000) (under strict scrutiny, government "must present more than anecdote and supposition").

Effectiveness of BCRA in Addressing the Perceived Problem. Defense public opinion expert Dr. Robert Shapiro candidly admitted that he is aware of no public opinion evidence showing that BCRA will actually reduce the "appearance of corruption." Henderson 337sa; *see* J.A. 987-90, Shapiro CX 114-17. Likewise, defense expert Sorauf testified that "it's speculative" whether BCRA would remedy any perception of corruption. *See* Henderson 337-38sa (*quoting* Sorauf CX 191).

D. The Decision of the District Court. The district court concluded that virtually all the restrictions on political parties offend the First Amendment guarantees of free speech and association. Applying strict scrutiny, Judge Henderson concluded that neither new Section 323(a) nor 323(b) is narrowly tailored to serve a compelling interest of the federal government. *See* Henderson 398sa. Likewise, she found invalid new Section 323(d), prohibiting political parties from donating funds to certain tax-exempt organizations, *see id.* 449sa, and new Section 323(f), restricting state candidates' use of nonfederal funds for "public communications" that refer to a federal candidate, *see id.* 460sa. She found valid

new Section 323(e), which restricts federal officeholders and candidates. *See id.* 460sa.

Judge Leon analyzed Title I under "intermediate scrutiny," but concluded that new Sections 323(a) and 323(b) were not "closely drawn" to achieve an important federal government objective. *See* Leon 1101-11sa, 1119-24sa. In an effort to salvage part of the statute, however, Judge Leon grafted new Section 323(b)'s definition of "federal election activity" onto new Section 323(a). *Id.* 1111-18sa. Then, he ruled that the definition of "federal election activity" was itself overbroad, but judicially limited that definition, for purposes of both new Sections 323(a) and 323(b), to a "public communication that refers to a clearly identified candidate for federal office and that promotes or supports . . . or attacks or opposes" a federal candidate. Leon 1111-18sa, 1119-24sa. Because it invalidated less of these sections than Judge Henderson's disposition, Judge Leon's disposition of new Sections 323(a) and 323(b) prevailed. Like Judge Henderson, Judge Leon voted to strike down new Section 323(d)'s restrictions on political party donations to tax-exempt organizations. *See id.* 1142-44sa. Judge Leon joined Judge Kollar-Kotelly in upholding the restrictions on state candidates in new Section 323(f). *See id.* 1146sa. He dissented from the panel's ruling to uphold the restrictions on federal candidates in new Section 323(e). *See id.* 1144-45sa.

Judge Kollar-Kotelly would have upheld Title I in its entirety, joining Judge Henderson with regard to new Section 323(e)'s restrictions on federal candidates and Judge Leon with regard to new Section 323(f)'s restrictions on state candidates. *See* Kollar-Kotelly 991sa, 993sa.

The court unanimously struck down on First Amendment grounds Section 213, which compels political parties to choose between independent or coordinated expenditures to support their candidates. *See* Henderson 384-85sa; Kollar-Kotelly 1011sa; Leon 1171-72sa.

Finally, over Judge Henderson's dissent, *see* Henderson 384-85sa, the court rejected plaintiffs' challenges to Section 214 (requiring an overbroad definition of "coordination"). *See Per Curiam* 134-57sa. The court unanimously held plaintiffs' challenge to Sections 304 and 319 (the "Millionaire's Provisions") to be nonjusticiable.[17] *See Per Curiam* 8sa; Henderson 475-76sa.

SUMMARY OF THE ARGUMENT

Although proponents of BCRA have described Title I as a simple effort to enforce longstanding prohibitions against the use of corporate and union money in federal campaigns, it is, in fact, much more than that. New Section 323(a) completely and without exception federalizes all aspects of national political party operations, even when those activities relate exclusively to state and local elections in years when no federal candidates appear on the ballot. It also severely restricts the ability of national party committees to associate with their state and local counterpart committees. Likewise, new Section 323(b) imposes pervasive federal dictates on how state and local parties spend money lawfully raised pursuant to state law, even when the spending primarily or even exclusively affects state and local elections. New Section 323(d) prohibits all political parties from donating even federally-regulated money to ideologically-aligned organizations; it even prohibits the CDP and CRP from supporting organizations spearheading the fight over recalling California's Governor at the March 2004 election. New Section 323(e) restricts the ability of federal

[17] The Political Party Appellants are not pursuing a challenge to the Millionaire's Provisions at this time. The Government has shown remarkable intellectual flexibility in defending strict contribution limits and limits on coordinated party expenditures as essential bulwarks against corruption, only to abandon those restrictions in the interest of aiding financially-strapped candidates facing wealthy opponents.

officeholders to work with state and local parties and candidates. And new Section 323(f) restricts the ability of state and local candidates to tout their close association with popular federal officeholders. This phalanx of interwoven restrictions is already undermining the ability of political parties to fulfill their pivotal role in American democracy.

I. Far more restrictive than a mere contribution limit, Title I's pervasive restraints on political party activity are subject to the strictest scrutiny under the First Amendment. The record is devoid of any evidence of actual *quid pro quo* corruption, and the poorly-worded public opinion poll commissioned by the Government to show an appearance of corruption is not probative. Even if, however, the record contained sufficient evidence of apparent corruption to justify some legislative action, Title I is not narrowly tailored nor even closely drawn to address those concerns.

II. Like the statute it amends, BCRA was purportedly passed pursuant to the Federal Elections Clause, Article I, Section 4 of the Constitution. Title I exceeds this delegated authority by regulating activity that has no conceivable effect on a federal election, such as the RNC's participation in state and local elections held in off-years. Moreover, Title I shows disdain for the states as dual sovereigns by subjecting to full federal regulation even activities by state and local parties that affect only state and local elections.

III. In contrast to the phalanx of restrictions imposed on political parties, BCRA leaves special interest groups largely unfettered to engage in virtually all election-related activities. Even if BCRA's restrictions on corporate and union broadcast "electioneering communications" were to survive constitutional challenge, interest groups (but not political parties) would remain free from regulation to engage in broadcast communications not within the definition of "electioneering communication," as well as all forms of non-broadcast communication such as telephone banks, direct

mail, and door-to-door canvassing. Interest groups have already begun raising the very money that national political parties may no longer accept, for use in the very activities that Title I extensively regulates when performed by political parties. In short, Title I's multitude of restrictions on political parties places parties at a severe disadvantage in relation to special interest groups.

ARGUMENT

I. BCRA's RESTRICTIONS ON POLITICAL PARTIES VIOLATE THE FIRST AMENDMENT.

Though defended in the lower court as a mere contribution limit or device to close loopholes, BCRA is much more. New Section 323(a) makes it a *felony* for the RNC's chairman to send a letter asking donors to give $25 to Mississippi gubernatorial candidate (and former RNC chairman) Haley Barbour for use in this November's off-year election. New Section 323(f)(1) prohibits Mr. Barbour from using his state-regulated campaign funds *this year* to send a mailing advocating state tax cuts and featuring President Bush, a declared candidate for reelection *next year*. During any even-numbered year, new Section 323(b)(2)(B)(iv) restricts the Yolo County Democratic Central Committee from collaborating with the CDP to spend funds raised pursuant to the Levin Amendment on a GOTV effort in a *mayoral election*. New Section 323(a) makes it a crime for the CRP to donate *even federal dollars* to a 501(c)(4) entity formed to support the current gubernatorial recall initiative. And new Section 323(a) subjects to criminal prosecution an RNC field representative who participates in a meeting to plan the fundraising, implementation, and spending for Louisiana's Victory Plan in *this year's* state elections. These restrictions, and the many others imposed by BCRA, on core rights of political speech and association simply cannot and should not survive First Amendment scrutiny.

Despite BCRA's severability clause, new Sections 323(a) and (b) are so closely tied together that, if one is invalid, both must fall.[18] Relying upon testimony by one of defendants' experts, Judge Henderson was "inclined to agree," Henderson 423sa (*quoting* Mann CX 110); she did not decide this question, however, because she held both new Sections 323(a) and (b) invalid.

A. The Many Restrictions on Association and Speech Imposed by New Section 323 Are Subject to Strict Scrutiny.

Unable to defend new Section 323 under strict scrutiny, defendants have vigorously argued for intermediate scrutiny under the mistaken view that BCRA falls neatly within the "contribution/expenditure" dichotomy set forth in *Buckley v. Valeo,* 424 U.S. 1 (1976) (*per curiam*). As shown above, however, new Section 323 contains a multitude of nonfinancial restrictions on speech and association; it directly "burden[s]" the most basic associational activities of political parties at all levels, and thus is subject to strict scrutiny. *See Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 225 (1989).

First, strict scrutiny applies because new Section 323 severely restricts political party rights of association with their members and with their component parts. This Court has made clear that "the First Amendment protects 'the freedom to join together [in parties] in furtherance of common political beliefs. . . .'" *California Democratic*

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[18] The legislative history reflects the view of BCRA's sponsors that *both* new Sections 323(a) and (b) were necessary to achieve Congress's purpose. *See* 148 Cong. Rec. H408 Feb 13, 2002 (stmt. of Rep. Shays) ("The only effective way to address this problem of corruption is to ban entirely all raising and spending of soft money by the national parties."); *id.* ("[a]n effective effort to address state party soft money spending" is "absolutely essential to . . . solving the soft money problem.").

Party, 530 U.S. at 574 (*quoting Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214-15 (1986)). The Government violates a political party's right of association whenever it interferes "with an activity integral to the association in the sense that the association's protected purposes would be significantly frustrated were the activity disallowed." L. Tribe, *American Constitutional Law* § 12-26, at 1016 (2d ed. 1988); *see also Eu*, 489 U.S. at 224 (right of association means more than just "that an individual voter has the right to associate with the political party of her choice"); *Tashjian*, 479 U.S. at 215 (same).

Any law burdening political parties' right of free association is "unconstitutional unless it is narrowly tailored to serve a compelling state interest." *California Democratic Party*, 530 U.S. at 582; *see Eu*, 489 U.S. at 231 ("Because the challenged laws burden the associational rights of political parties and their members, the question is whether they serve a compelling state interest."); *Tashjian*, 479 U.S. at 217 (rejecting state's claim that law restricting parties' associational rights "is a narrowly tailored regulation which advances the State's compelling interests").[19] Like the burdens imposed on political parties in *California Democratic Party*, *Eu*, and *Tashjian*, those in BCRA must be subjected to strict scrutiny and declared invalid.

Second, new Section 323 does not limit "contribut[ions] to a *candidate*," where the potential for apparent corruption is at its zenith and which this Court has

[19] *See also Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) ("freedom of expressive association" could be overridden only by "'regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms'") (*quoting Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)); Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law*, §20.41, at 523 (3d ed. 1999).

"identified" as the "single narrow exception to the rule that limits on political activity [are] contrary to the First Amendment." *Citizens Against Rent Control*, 454 U.S. at 296-97 (emphasis in original). Accordingly, this Court's decisions applying intermediate scrutiny to limits on contributions to candidates are not controlling.[20]

Instead, as Judge Henderson observed, Title I runs headlong into on-point precedent applying strict scrutiny to invalidate (i) limits on contributions to political associations (like the political parties here) that fund pure issue speech unrelated to federal campaigns, *see Citizens Against Rent Control*, 454 U.S. at 294, and (ii) restrictions on noncoordinated spending by political parties, *see Colorado I*, 518 U.S. at 608. It thus sweeps within its ambit a whole host of speech activity that the Government may not constitutionally restrict at all. *See* Henderson 419-20sa.[21]

In *Citizens Against Rent Control*, the Court applied strict scrutiny and struck down under the First Amendment a local ordinance that limited *contributions* to a political association that, in turn, engaged in pure issue speech. 454

[20] *See Buckley*, 424 U.S. at 29; *see also Beaumont v. FEC*, 539 U.S. __, Slip Op. at 1 (2003) (upholding prohibition on contributions to candidates by non-profit advocacy organizations); *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) ("*Colorado II*") (treating party coordinated expenditures as contributions to candidate); *Nixon v. Shrink Missouri PAC*, 528 U.S. 377, 395 (2000) (upholding Missouri state law contribution limits); *California Medical Ass'n v. FEC*, 453 U.S. 182, 201 (1981) (plurality upholding contribution limits to political committees established to make contributions to candidates); *id.* at 203 (Blackmun, J. concurring) (casting decisive vote and noting that "a different result would follow if [the limitation] were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates.").

[21] *Buckley* did not address limits on contributions to political parties, which Congress did not impose until after *Buckley* was decided.

U.S. at 296-99. Political parties spend money to support or oppose ballot initiatives, the *precise* activity at issue in *Citizens Against Rent Control*. 454 U.S. at 292. And the district court found that the RNC has recently participated in important public policy debates concerning, for instance, a balanced budget amendment, welfare reform, and education policy. *See* Henderson 293sa; Leon 1195sa.

Third, even if considered under the *Buckley* framework, new Section 323 would be subject to strict scrutiny because it directly limits spending. As this Court said in *Beaumont*, the level of scrutiny appropriate for "political financial restrictions" – and as shown, new Section 323 is much more than a "financial restriction" – "is based on the importance of the 'political activity at issue' to effective speech or political association." *Id.* Slip Op. at 14 (*quoting FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 259 (1986) ("*MCFL*")). The Court noted that *FEC v. National Right to Work Committee*, 459 U.S. 199 (1982), applied intermediate scrutiny because that committee was "organized to make contributions," whereas *MCFL* applied strict scrutiny "to invalidate the ban on an advocacy corporation's expenditures." *Beaumont*, Slip Op. at 15.

By acknowledging that the source restrictions in Section 441b were subject to strict scrutiny in *MCFL*, *Beaumont* rejected the simplistic notion that contribution limits must always be subject to intermediate scrutiny. Indeed, *MCFL* applied the highest level of scrutiny even though there was no restriction on the amount that the corporation could spend for independent express advocacy, but simply a requirement that all such political spending be done with dollars subject to FECA's restrictions. Although limiting the source of the funds was "not an absolute restriction on speech, it [was] a substantial one" that needed to be "justified by a compelling state interest" because, among other things, it "reduce[d] the sources of funding"

available "to engage in core political speech." *MCFL*, 479 U.S. at 252, 255.

Similarly, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), applied strict scrutiny to a requirement that corporations do all political spending "through separate segregated funds" subject to FECA-like restrictions, because requiring corporations to spend only regulated monies on political activity "burden[s] expressive activity." *Id.* at 657-58. Here, requiring national political parties to engage in political spending exclusively with federal money is subject to strict scrutiny, particularly since, unlike the prohibited corporate funds in *Austin*, the money raised and spent by the RNC "reflects actual public support for the political ideas espoused by" the RNC. *Austin*, 494 U.S. at 660. Thus, new Section 323(a) is subject to strict scrutiny.

Just as clearly, new Section 323(b) places *no* restriction on the *raising* of nonfederal money; a state party may continue to raise as much state-regulated money as state law allows. Rather, new Section 323(b) limits only the *spending* of such lawfully-raised money and, accordingly, must be viewed as a pure expenditure limit subject to strict scrutiny. *Buckley*, 424 U.S. at 44-45; *see also Colorado I*, 518 U.S. at 609; *NCPAC*, 470 U.S. at 496.

Finally, the Government and Intervenors concede that Title II's limit on spending for "electioneering communications" is subject to strict scrutiny, and the district court unanimously agreed. *See* Henderson 363sa; Kollar-Kotelly 781sa; Leon 1147sa. It would be odd to subject new Section 323 to *lower* scrutiny when it imposes far more pervasive restrictions, including those on both raising *and* spending money, on political parties whose sole function is core political speech.

B. Section 323(a)'s Restrictions on National Party Committees Violate the First Amendment.

1. Section 323(a) Impermissibly Impedes the Ability of National Party Committees To Associate with State and Local Party Committees.

As a federation of state parties, the Republican Party "comprises several interacting, independent entities that work closely together on a daily basis" to promote Republican ideals, elect candidates who espouse those ideals, and govern according to those ideals at the local, state, and national levels. *See* J.A. 298-99, Josefiak Decl. ¶11. Senator McCain accurately testified, however, that new Section 323 erects a "firewall" between national and state party committees, J.A. 952, McCain Dep. 223, and thus strikes at the very heart of the parties' associational activities.[22]

A key example of the close working relationship among local, state, and national Republican Party committees and candidates is the creation, financing, and implementation of full-ticket "Victory Plans." *See supra* at 19-20. These voter mobilization plans are the essence of the democratic process. Yet, new Section 323(a) proscribes effective RNC participation in Victory Plans. RNC employees have historically been integrally involved in deciding how nonfederal funds will be "solicit[ed]," "receive[d]," and "spen[t]," for Victory Plans, in "transfer[ring]" both federal and nonfederal funds to state parties for these programs, and in "solicit[ing]" federal and nonfederal funds for them.[23] All

[22] *See* J.A. 206-07, Duncan Decl. ¶7; J.A. 1410-12, La Raja Decl. ¶12.

[23] While the Government has sought refuge in the FEC's regulatory definition of "direct[ing]," the Intervenors have challenged that definition in court. *See Shays* v. *FEC*, Civ. No. 02-CV-1984 (D.D.C., filed Oct. 8, (continued...)

of these activities by RNC personnel are now felonies if any nonfederal or Levin money is involved, even during years in which no federal offices appear on the ballot. *See* new §323(a). Moreover, new Section 323(b)(2)(B)(iv)'s "homegrown" requirement prohibits national party committees from providing state and local parties with *even federal money* for voter mobilization activities if those activities use any nonfederal or Levin money.

In short, *any* RNC participation in Victory Plans – merely sitting down at a table and participating in collective decisionmaking about how money will be solicited, received, and spent – is covered by new Section 323(a). To avoid felony prosecution, the Victory Plan must proceed without RNC involvement, or the entire program must be paid for with 100% federally-regulated money. State and local parties and candidates are punished simply for associating with the RNC. *See* J.A. 299-311, Josefiak Decl. ¶¶40, 77.

New Section 323(a) also forces RNC officers to discontinue their fundraising assistance to state and local parties and candidates. In the district court, the Government proposed two equally absurd solutions. *First*, the Government invoked FEC regulations allowing state party officials who are members of national party committees (but *not* national party officers or employees) to "wear multiple hats," 67 Fed. Reg. 49,083 (July 29, 2002), as support for the remarkable suggestion that RNC officials should simply raise nonfederal funds for state and local parties and candidates in their "*individual capacities*." Putting to the side whether any prudent person would engage in this sort of schizophrenia, it is not realistic to require RNC officers to pay for their fundraising trips with *personal funds*. Moreover, it is

2002). In any event, the FEC regulations do nothing to narrow the bans on "solicit[ing," "receiv[ing]," "transfer[ring]," or "spend[ing]" nonfederal money.

precisely the fact that the RNC chairman is acting *on behalf of the RNC* that makes those solicitations effective. Compelling the RNC chairman to disassociate from the RNC – even temporarily – is yet a further burden on First Amendment freedoms.

Second, the Government and Intervenors propose that RNC officers simply solicit *federal money* for *state and local* candidates and parties. But state and local candidates register, raise, spend, and report their finances pursuant to *state* and *local* law; they do not, and cannot, even register with the FEC or raise federal funds. They raise and spend *nonfederal money*, which RNC officers cannot "solicit." Defendants' suggestion that state candidates accede to federal regulation merely confirms BCRA's utter disdain for the states as dual sovereigns. *See* Part II below.

New Section 323(a) also burdens the RNC's ability to communicate with its members and adherents. Before BCRA, the RNC relied in part on nonfederal funds to "communicate[] directly with its own members and adherents, a function that is vitally important to building the Party." J.A. 41-42, Banning Decl. ¶28(f); *see also* J.A. 1602-03, Milkis Decl. ¶48. Yet, whereas corporations and labor unions have a recognized right to use nonfederal funds to communicate with their officers, shareholders, and members on any subject (even to endorse a federal candidate), new Section 323(a) requires national parties to use exclusively federally-regulated funds for all communications with their members.[24]

[24] *See* 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. §114.3(a)(2); *see also United States v. CIO*, 335 U.S. 106, 120-21 (1948) (Court had "gravest doubt … as to constitutionality" of statute restricting corporations and unions from communicating with members on matters of public importance); *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995) ("The (continued…)

2. New Section 323(a) Unjustifiably Prohibits Solicitations.

New Section 323(a) also prohibits *pure speech*: Party officials are prohibited from uttering words of "solicit[ation]" for otherwise legal contributions. As but one example, it is perfectly legal for anyone else to say "contribute to the Jones for Governor campaign," but it is a *crime* for a national party official merely to utter *those exact words*. BCRA likewise categorically prohibits party committees from assisting each other in raising lawful Levin money, *see* new §323(b)(2)(B)(iv), and prohibits *all* political parties from soliciting donations on behalf of any tax-exempt organization that engages in Federal election activity, *see* new §323(d).

"Solicitation is a recognized form of speech protected by the First Amendment." *United States v. Kokinda*, 497 U.S. 720, 725 (1990). Indeed, this Court's "cases have long protected speech even though it is in the form of … a solicitation to pay or contribute money." *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977).

In *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 622 (1980), the Court struck down an ordinance banning door-to-door or on-street solicitations by charitable organizations not using at least 75% of their receipts for "charitable purposes." The Court accorded the solicitation full constitutional protection: "[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment." *Id.* at 632. Because there were less restrictive means of preventing fraud and protecting personal

Supreme Court long ago … recognized an organization's … First Amendment right to communicate with its 'members.'").

privacy, the Court invalidated the anti-solicitation ordinance at issue. *See id.* at 637-39.[25]

Significantly, the Court in *Schaumburg* emphasized that solicitation "is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, *political*, or social issues." *Id.* at 632 (emphasis added). "[W]ithout solicitation," the Court said, "the flow of such information and advocacy would likely cease." *Id.*

As the Court observed in *Schaumburg*, political solicitation is informational and ideological. *See* J.A. 342-43, Knopp Decl. ¶25. This Court has repeatedly stressed that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," *Mills v. Alabama*, 384 U.S. 214, 218 (1966), and "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office," *Eu*, 489 U.S. at 223 (*quoting Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Under no meaningful analysis could BCRA's solicitation restrictions be said to be narrowly tailored, or even closely drawn, to address any interest that the Government is entitled to pursue.

3. New Section 323(a) Is Grossly Overbroad.

As shown, because of the "heav[y]" and "severe" burdens it imposes on political party associational freedoms, new Section 323(a) is "unconstitutional unless it is narrowly

[25] *See also Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984) (striking down Maryland ordinance similar to the one in *Schaumburg* as not "precisely tailored"); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 787, 789, 794 (1988) (striking down North Carolina statute prohibiting professional fundraisers from charging "unreasonable" fees).

tailored to serve a compelling state interest." *California Democratic Party*, 530 U.S. at 581-82. The First Amendment requires that "[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion by Kennedy, J.).[26] It "must demonstrate that the recited harms are *real*, . . . and that the regulation *will in fact alleviate these harms in a direct and material way*." *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (emphasis added). *See also NCPAC*, 470 U.S. at 498 (invalidating independent expenditure limit where corruption "remain[ed] a hypothetical possibility and nothing more").

Here, lacking evidence of actual *quid pro quo* corruption, *see* p. 26 above, the Government grasps onto the slippery notion of "an appearance of corruption." Its "principal" evidence, Leon 1289sa, is a poorly-worded public opinion poll that proves only that the public views all "big" contributions – federal and nonfederal alike – with an equally jaundiced eye. Defendants' survey merely confirms that the appearance of corruption, like the now largely repudiated "appearance of impropriety" in legal ethics,[27] is far too

[26] In *Colorado I*, six members of the Court expressly adopted for the campaign finance context Justice Kennedy's statement for the plurality in *Turner* that the government must show that speech regulations address a *real* harm. *See* 518 U.S. at 618 (O'Connor, Souter & Breyer, JJ.); *id.* at 647 (Rehnquist, C.J., Scalia & Thomas, JJ.) (concurring in the judgment and dissenting in part).

[27] *See, e.g.*, ABA Comm. on Ethics and Professional Responsibility. Formal Op. 342 (1975) ("too vague to be useful"); Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 Minn. L. Rev. 243, 265 (1980) ("simply too dangerous and vague"); *Adoption of Erica*, 686 N.E.2d 967, 973 n.10 (Mass. 1997) ("standard that has been rejected by most courts").

elastic a standard by which to regulate core political speech and association.

Based on this less than persuasive record, BCRA presents a "wholesale restriction of clearly protected conduct." *NCPAC*, 470 U.S. at 501. New Section 323(a)'s flat ban on the solicitation, receipt, transfer, and disbursement of nonfederal money by national political parties is not "narrowly tailored" because *it is not "tailored" at all*. There are no exceptions.

It cannot be contended in good faith that *every* conceivable solicitation, receipt, transfer, or disbursement of nonfederal money by a national political party – even when the amounts are small, no federal candidate is involved, and no federal election is near – risks corrupting federal officeholders. Indeed, this Court has recognized – correctly, as this record shows – that the "opportunity for corruption" posed by "unregulated 'soft money' contributions to a party for certain activities, *such as electing candidates for state office or for voter registration and 'get out the vote' drives*" is "*at best, attenuated.*" *Colorado I*, 518 U.S. at 616 (emphasis added). Even if *some* uses of nonfederal money carried a potential for corrupting federal officeholders, a statute that "indiscriminately lumps" together *all* uses of that money constitutes a "fatally overbroad response to [the perceived] evil." *NCPAC*, 470 U.S. at 498, 500. Congress simply may not outlaw protected First Amendment activity in an effort to suppress unprotected activity. *See, e.g.*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

BCRA itself proves that new Section 323(a) is neither narrowly tailored nor even closely drawn. New Section 323(e), which regulates the very federal candidates and officeholders at the heart of the concern with corruption, contains numerous exceptions, allowing federal officeholders to raise nonfederal money for state parties and candidates up to the analogous federal limit (new Section 323(e)(1)(B)), to

speak at state and local party fundraising events (new Section 323(e)(3)), and even to raise money for politically-active nonprofit groups (*compare* new Sections 323(e)(4) *with* 323(d)).[28]

These provisions subjecting political parties to flat bans while permitting federal candidates and officeholders to engage in the same activities reveal an utter lack of tailoring, drawing, or even rationality in the Act's treatment of parties. Worse, these provisions flip the campaign-finance world on its head. It is, after all, the actual and perceived corruption of *candidates and officeholders* – not *political parties* – to which this Court has said campaign-finance laws may be properly addressed. So, why an outright ban on party activity and a Swiss-cheese approach to regulating the same activities when engaged in by candidates and officeholders? Asked, in effect, that very question in their depositions, BCRA co-sponsors Senators McCain and Feingold had no answer. *See* J.A. 944-52, McCain Dep. 205-15 ("I'll have to get back to you on that."); J.A. 854-55, Feingold Dep. 189 (unable to explain distinction "off the top of [his] head").

New Section 323(a) is also facially overbroad because it purports to limit national party "spend[ing]" that is not coordinated with any candidate's campaign. In *Colorado I*, the Court stressed that the "constitutionally significant fact" in assessing limits on party spending is "the lack of coordination between the candidate and the source of the expenditure," and held that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." 518 U.S. at 616-

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[28] Even though new Section 323(b) severely and unconstitutionally constrains state and local parties (see Part I.C. below), it at least superficially nods in the direction of tailoring by purporting to focus on over-broadly defined "Federal election activity."

17; *see also NCPAC*, 470 U.S. at 493; *California Medical Ass'n*, 453 U.S. at 203 (Blackmun, J., concurring). *Colorado II* reaffirmed the right of a political party to "spend money in support of a candidate *without legal limit* so long as it spends independently" and emphasized that "[a] party may spend independently *every cent it can raise* wherever it thinks its candidate will shine, on every subject and any viewpoint." 533 U.S. at 455 (emphasis added). Because new Section 323(a) limits the RNC's uncoordinated as well as its coordinated spending, it is invalid.

Even if new Section 323(a) were subjected to intermediate scrutiny, it would fail. *See* Leon 1111sa. The record shows that *only a third* of RNC nonfederal money was used for the supposed evil Congress wanted to address – candidate-specific issue advertisements (p. 13 above) – and that RNC reliance on federal officeholders to raise nonfederal money was "exceedingly rare" (pp. 13 above). Even assuming a legitimate interest in curtailing federal officeholder involvement in raising nonfederal money to be spent on candidate-specific issue advertising, Congress simply made no effort whatsoever to tailor, draw, or in any way narrow Section 323(a) to address that objective.

As Judge Henderson noted below, the Government and Intervenors have never claimed that new Section 323(a) is narrowly tailored. Instead, they have defended its indiscriminate reach as a necessary prophylaxis to avoid circumvention of contribution limits. As she correctly emphasized, however, "[b]road prophylactic rules in the area of free expression are suspect." Henderson at 418sa (*quoting NAACP v. Button*, 371 U.S. 415, 438 (1963)).

4. Title I Cannot Be Re-Written to Substitute New Section 301(20)(A)(iii) for New Section 323(a).

Having concluded that new Section 323(a) is not closely drawn to prevent actual or apparent corruption, Judge Leon, joined by Judge Kollar-Kotelly, nonetheless undertook to do the drawing himself, by replacing it with a ban on national parties' use of nonfederal funds for "a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports . . . or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." New Section 301(20)(A)(iii).

The district court's approach oversteps judicial bounds. "The clarity and preciseness" of new Section 323(a) make it impossible to narrow "its indiscriminately cast and overly broad scope without substantial rewriting." *See Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964); *see also Reno v. ACLU*, 521 U.S. 844, 884 (1997) ("This Court will not rewrite a . . . law to conform it to constitutional requirements"). Indeed, Congress expressly considered and rejected a less restrictive alternative to the ban on national party use of nonfederal funds that was quite similar to the formulation of new Section 323(a) crafted by Judge Leon.[29]

Moreover, the district court rewrote new Section 323(a) to create a pure expenditure limit. The rewritten

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[29] The so-called "Ney Amendment" would have allowed national parties to spend nonfederal money for any activity except "federal election activities," defined to include only (i) issue advertising, using the *same* definition as new Section 301(20)(A)(iii) as enacted, and (ii) voter registration and GOTV, but *only* if they "mention[ed], depict[ed], or otherwise promote[d] a clearly identified Federal candidate." 148 Cong. Rec. H460 (2002). The House rejected the Ney Amendment by a vote of 248-181. *See* 148 Cong. Rec. H464 (2002).

provision does not prevent any raising of nonfederal money by national, state, or local political parties, but instead prohibits them from spending nonfederal money for any "public communication" – print, broadcast, mail, telephone bank, or billboard – that "refers to" a federal candidate and "promotes," "supports," "attacks," or "opposes" that candidate. *See* new § 301(22) (defining "public communication"). This restriction fails strict scrutiny, because it is even broader than the vague and overbroad restrictions on special interest groups in Title II, which apply only to *broadcast* advertisements aired immediately before a Federal election so as to reach the *relevant electorate*.

C. Section 323(b)'s Restrictions on State and Local Party Committees Violate the First Amendment.

According to the Government, new Section 323(b) simply prevents state and local parties from using nonfederal money for activity that "affects" federal elections and thereby merely reaffirms the original intent of FECA. In fact, new Section 323(b) and, in particular, the definition of "Federal election activity," deliberately discards some of the key limitations of FECA in order to reach activities never contemplated by that Act. It is also an impermissible attempt to restrict party campaign spending at the state and local level by limiting both expenditures and the parties' ability to engage in collective campaign activity.

1. New Section 323(b) Impermissibly Regulates State and Local Party Activities That Have No Ability To Corrupt Federal Candidates.

As stated earlier, new Section 323(b) and the definition of "Federal election activity" do not impose limits on contributions. Rather, they operate broadly to limit spending unrelated to a federal candidate or, in some cases,

unrelated to any candidate at all. "Federal election activity" under BCRA includes virtually all political activity conducted by state or local parties if the state conducts its state or local elections at the same time as federal elections, since it includes most voter registration, most activities focused on voter identification and turn-out (for any race or issue), and most generic party promotional activities.

With the exception of the "public communications" provision, BCRA does not require that the activity be directed at or even mention a federal candidate. There is no exemption for activities that are directly related to state or local candidates, or that mention only those candidates. Indeed, with respect to voter identification, GOTV, and generic activities, "Federal election activity" specifically *includes* "a public communication that refers *solely* to a clearly identified candidate for State or local office" if the activity is for voter registration, voter identification, or GOTV activity. *See* § 301(20)(A)(i), (ii) (emphasis added.)

By including activities based only on their proximity to a federal election, Congress has significantly expanded the scope of federal regulation into spending that has virtually no connection to federal elections. These activities are now, by definition, "federal" and can be funded only with federal money or a combination of federal money and Levin funds.

Under FECA, the touchstone for regulating either contributions or expenditures was that such activities were "for the purpose of influencing" a federal election. Although FECA regulated activities directed at federal candidates, activities directed at state and local elections were completely outside FECA and could be funded as permitted by state law. "Mixed" activities benefiting both federal and nonfederal candidates were "allocated" between federal and nonfederal funds. "Generic" activities such as issue advocacy or party promotional materials were also allocated. Under BCRA, all

of these activities – federal, state, mixed, and generic – are swept within the rubric "Federal election activity."

To illustrate, Judge Henderson found that the following were "Federal election activities" under new Section 323(b):

- A generic mailer stating "Our Vote is our Voice. Keep Asian Pacific Families Moving Forward. Vote Democrat;"
- A telephone script featuring Jesse Jackson urging voters to defeat a school voucher *ballot initiative*;
- A mailer urging voters to vote for several *state* and *local* candidates.

See Henderson 436-437sa; J.A. 157, 1717, 1721, 3 PCS CDP/CRP App. 51, 177, 197, 208, 209. In *Colorado I*, the Court found that the opportunity for corruption posed by nonfederal contributions for activities such as "electing candidates for state office . . . voter registration, and 'get out the vote' drives" was, "at best, attenuated." *Colorado I*, 518 U.S. at 616. The district court similarly concluded that the Government's evidence failed to demonstrate any likelihood of corruption of federal candidates arising out of these activities. *See* Leon 1122-23sa; Henderson 438sa.

In fact, BCRA goes beyond even the activities discussed in *Colorado I* and regulates contributions for ballot measure expenditures. As the Court made clear in *Citizens Against Rent Control*, the justifications for limiting contributions to candidates simply do not apply in the context of contributions for non-candidate-related disbursements such as ballot measure activity, since the only justification for such limits is the "perception of undue influence of large contributors to a *candidate*." 454 U.S. at 297 (emphasis in original); *see also First Nat'l Bank of Boston v. Bellotti*, 435

U.S. 765 (1978). This same reasoning applies to disbursements for activities such as voter registration and generic GOTV, as well as expenditures made in support of state and local candidates.

Judge Leon and Judge Henderson both correctly focused on the potential for corruption posed by these activities, as opposed to simply whether there was any "effect" on the federal election. Both concluded that in order to present a threat of corruption sufficient to justify federal regulation, there must be a benefit or appearance of benefit to a federal candidate. Judge Leon (1122-35sa) concluded that the evidence failed to demonstrate any such effect or any public perception that funds used for such activities created the kind of "indebtedness" necessary for the appearance of corruption:

> The evidence . . . fails to demonstrate either the degree of effect such activities have on the federal candidate's re-election, or the existence of a public perception that donations used to fund such efforts create a sense of indebtedness between the federal candidate and those who make large donations to the party. . .
>
> Thus, in the absence of a substantial evidentiary showing to the contrary, it is "mere conjecture," *Shrink Missouri*, 528 U.S. at 392, by the defendants that an appearance of corruption arises from donations to state parties, or transfers from national parties, that are used for these generic or noncandidate-specific activities set forth in Sections 301(20)(A)(i) and (ii).

Judge Henderson agreed, stating that "Sections 301(20) and 323(b) . . . require state parties to spend federal funds on activities that will not plausibly corrupt any federal candidate." Henderson 434sa. Judge Henderson specifically

discussed an advertisement against Proposition 209. The advertisement urged voters to reject an "anti-affirmative action" initiative, and included the following language (as part of a longer advertisement):

> ...Vote No on 209. Vote No on the Republican scheme to turn the clock back and shut down equal opportunity for all. On Tuesday, vote yes for our future and no on Prop. 209. Don't let the Republicans get away with it. Don't stay home. That's what they're counting on. Paid for by the California Democratic Party.[30]

Addressing Intervenors' argument that the spot had an effect on the contemporaneous federal election, Judge Henderson's response was clear and emphatic: "Their contention, even if correct, is irrelevant. The Congress cannot, consistent with First Amendment strict scrutiny, limit a political party's pooling of individual, corporate or union donations to pay for an ad *that so plainly has no corrupting effect, real or imagined, on any federal candidate or officeholder*." Henderson at 436sa (emphasis added).[31] Based on the broad regulation of ballot measure activity, purely state election activity, and generic party activity, Judges Henderson and Leon agreed that new Section 323(b) was not narrowly tailored (Henderson 433sa) or closely drawn (Leon 1123-24sa) to prevent corruption or the appearance of corruption.

Although it is the only category of "Federal election activity" that actually requires the mention of a federal candidate, even the "public communications" section of the

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[30] Henderson 435sa.

[31] Nor could Congress do so, consistent even with intermediate scrutiny, because, as Judge Henderson points out, the advertisement carries with it "*no* corrupting effect" whatsoever. *Id.* (emphasis added).

definition of "Federal election activity" is substantially overbroad. *See* new § 301(20)(A)(iii). That provision requires any public communication that refers to a clearly identified federal candidate and "promotes," "supports," "attacks" or "opposes" that candidate at any time to be paid with 100% federal funds, regardless of whether the communication "expressly advocates a vote for or against" that candidate. These terms are not defined either by the statute or the recent FEC regulations.

The constitutional infirmities of this provision are similar in many respects to those before the Court in the context of the "electioneering communication" provisions in Title II, and those arguments will not be repeated here except to make a few points relevant to the political parties.

First, the "public communications" provision of Title I applies at *any* time, not just in an election year, and includes communications in *all* media, including mail. If this provision is intended to curtail "sham issue ads" run in close proximity to federal elections (and, even assuming such advertisements constitutionally could be regulated), it is not at all tailored to "capture" those communications.

Second, political parties often engage in communications that feature federal candidates for a host of reasons relating to the activities of the party itself, and not to a particular election. The record contains numerous examples: a "welcome to the party" certificate for newly registered voters that featured well-known state and federal party officeholders; an invitation to an event featuring a federal candidate as a sponsor; a letter from a federal candidate supporting a ballot initiative sent out by the party to all members; and an endorsement of a local candidate for mayor by a federal officeholder. *See* 3 PCS CDP/CRP App. 319, 208, 209, 368, 369. Any of these could be said to "promote" the party's federal candidates in some sense, and yet requiring that they be funded with federal money will

severely limit the party's ability to communicate with its own members.[32]

Finally, if there is any question about the difficulty in interpreting the scope of this provision, it is surely answered by the very hypothetical used by Judge Leon: the "No Child Left Behind" advertisement that mentioned President George Bush. While appearing to Judge Leon clearly to be a "genuine" issue advertisement, Judge Kollar-Kotelly stated that it "raises questions." Leon 1106-08sa; Kollar-Kotelly 510sa. If the provisions prompt such disagreements within the judiciary, it is difficult to see how party committees can reasonably be expected to conform their conduct. Of course, this was exactly why *Buckley* required "express" words of advocacy, and this Court should require no less.

Nor are the numerous restrictions on the rights of the state and local political parties justified as a means for limiting "circumvention," as that concern was articulated in *Buckley* and *Colorado II*. As the district court properly found, the "circumvention" addressed in these cases was circumvention of the limits on contributions to candidates. If a contribution can be limited because it presents a threat of corruption to a federal candidate, but a much larger contribution can be made through a political party, it undermines the original limit. Or, as the Court held in *Colorado II*, since party coordinated spending was the "functional equivalent" of a direct candidate contribution, unlimited coordinated spending would "exacerbate the threat of corruption . . . that those contribution limits are aimed at reducing." *Colorado II*, 533 U.S. at 453.

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[32] This restriction is also likely to end party "slate mail," which lists all the party's candidates. Prior to BCRA, if one federal candidate and nine nonfederal candidates were featured equally, one-tenth of the cost of the piece had to be paid with federal funds. Now, the piece must be funded with 100% federal money, a prohibitive requirement.

With or without BCRA, the state parties cannot use *nonfederal* funds for either candidate contributions or coordinated party expenditures for federal candidates; in the absence of BCRA, those funds can be used only for generic or non-federal-candidate-specific expenditures. More precisely, they can be used only for the *nonfederal portion* of the cost of a generic activity, since all generic activities were allocated between federal and nonfederal accounts. Only expenditures for state and local election activity could be paid *completely* with nonfederal funds. Therefore, restrictions on those activities (or contributions to be used for those activities) cannot be justified by any need to avoid circumvention of the underlying federal contribution limits, because those activities are not the "functional equivalent" of direct contributions or coordinated expenditure.

The flaw in BCRA is its presumption that, because state and local parties may support federal candidates, all of their activities have that purpose. Although a state party may make expenditures on behalf of federal candidates, it does a great deal more than that. Its members make donations not merely, or even primarily, to support federal candidates, but to support the parties' state and local candidates, to participate (in California) in ballot measure advocacy, and to represent their views in the process of government. The federal government cannot, consistent with the First Amendment, limit expenditures for activities (or contributions to be used for those activities) other than those with a potential for corruption of federal candidates and officeholders. No decision of this Court allows the federal government to regulate contributions and expenditures unrelated to federal candidates in the way that BCRA attempts to do.

2. Section 323(b) Prevents the State and Local Parties from "Banding Together To Achieve a Common End."

The limits on spending imposed upon the state and local parties are exacerbated by provisions that prohibit those parties from "banding together to achieve a common end." *Citizens Against Rent Control*, 454 U.S. at 294. The parties are essentially denied the opportunity to engage *collectively* in effective advocacy, which the Court has viewed as "undeniably enhanced by group association." *Id.* at 295.

New Section 323(b) prohibits a state or local party from engaging in "Federal election activities" with Levin contributions that have been solicited, received, or directed through joint fundraising activities, or with *any funds* transferred, contributed, or provided by any national party committee or any other state or local party committee if Levin funds are being used. *See* new §§ 323(b)(2)(B), 323(b)(2)(B)(iv), 323(b)(2)(C).

In other words, BCRA not only prohibits the transfer or joint fundraising of *Levin* funds, it also prohibits the transfer of *federal* money between political party units if that money is to be used for "Federal election activity" funded in part with Levin money. The transfer ban is not limited to transfers from the national party committees; it applies with equal force to transfers between the state and local party committees. The result is that, during a federal election year, a state party may not transfer any money – federal, nonfederal, or Levin – to a local party for GOTV activities in a *state* election if any Levin money is used. Similarly, the joint fundraising restrictions make it illegal for two local party committees to conduct a joint fundraiser to raise *state-regulated* money for a voter registration drive.

Fundraising is inextricably intertwined with political activity. *Schaumberg*, 444 U.S. at 632. While there may be

"some activities, legal if engaged in by one, yet illegal if performed in concert with others, [] political expression is not one of them." *Citizens Against Rent Control,* 454 U.S. at 296. In addition, if the state or local parties collectively decide that a particular race has special importance and want to channel their collective resources to that race – resources raised completely in compliance with state or federal law – there is no lawful basis for the government to interfere with that internal decision. In such cases, the parties should have the freedom that other organizations have to make basic decisions about where money is best spent. These decisions reflect the group's collective decision-making and priorities. As shown (Part I.A.), interference with this right to self-governance is subject to strict scrutiny. *California Democratic Party*, 530 U.S. at 582.

As shown (Part I.B.), new Section 323(b) also dramatically inhibits the participation of the state and local political parties in the Republican Victory Plans and Democratic Coordinated Campaigns. Restrictions described in the context of national parties are, of course, equally applicable to the state and local parties, which provide the grass-roots organizational resources.

In addition, many state and local party officers also serve in various capacities with their national party. *See* J.A. 115-16, Bowler Decl. ¶¶3-4; J.A. 600, Morgan Decl. ¶8. BCRA therefore creates the risk of criminal penalties for a state or local party officer who is responsible for raising nonfederal funds for the state party and who also serves as an officer of the party's national committee, because he or she may be accused of raising those funds as an "officer" or "agent" of the national committee. [33] At the least, these

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[33] Although the FEC regulations give state party officers who serve on national party committees some comfort, the Intervenors have challenged those regulations. *Shays v. FEC, supra.*

provisions are likely to inhibit full participation in campaign discussions by these persons, and discourage state and local officers from involvement in the national parties.

The freedom to associate entails both ability to affiliate and ability to pool resources with like-minded persons in furtherance of common goals. Under BCRA, party committees are precluded from both affiliating (as a result of the restrictions on the national parties and federal officeholders in state campaign activity) and from pooling their resources with each other (as a result of the joint fundraising and transfer bans). These restrictions are direct impediments to the state and local parties working collectively to "conduct[] the party's campaigns," as provided by California law. More fundamentally, if the parties cannot effectively organize and speak on behalf of their membership, they will be precluded from "effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Buckley,* 424 at 22.

Nor are the restrictions on association in new Section 323(b) narrowly tailored or, in fact, tailored at all. The ban on transfers of both federal and nonfederal money illustrates this point. New § 323(b)(2)(B)(iv). Federal money is, by definition, money raised in compliance with all of the federal limitations as to both source and amount. It is money that has been determined by Congress to be noncorrupting if used directly to support a candidate. It is inexplicable how a transfer of such money can be corrupting even though the initial contribution is not. The same is true for the transfer of Levin funds among the state and local parties. Transferring money already raised within certain limits to another party committee, for uses not directly related to federal candidates, cannot be corrupting. The prohibition is absolute; it is not tailored to address, for example, large transfers or transfers shown to have a particular potential for corruption. Judge

Henderson concluded that even if the transfer provisions were aimed at national party funding for "issue ads" (and if such a problem could be constitutionally addressed, a question she answered in the negative), the provision was required to be more narrowly tailored. *See* Henderson 440sa.

Similarly, a joint effort with another party committee to raise Levin funds, where the funds to be raised are statutorily limited and are legally permissible as to both committees, cannot lead to either corruption or the appearance of corruption. Neither the Government nor the Intervenors have explained how joint fundraising among state and local parties raising state-regulated money for use in state elections could create the potential for corruption of federal candidates.

3. New Section 323(b) Prevents State and Local Political Parties from Amassing the Resources for Effective Advocacy.

Although *Buckley* upheld the contribution limits at issue in that case, the Court acknowledged that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. The Levin limits on the use of state-regulated money, coupled with the restrictions on normal associational activities, in fact create "a system of suppressed political advocacy" that offends the First Amendment. *Nixon*, 528 U.S. at 396.

The requirement that a particular expenditure be funded with federally-regulated money has significant consequences for the state and local parties. For example, CDP has raised approximately $4 million in federal money during each of the last several cycles. *See* Henderson 315sa; Leon at 1240sa. Administrative expenses have been approximately $5-6 million per cycle. *See* J.A. 117-18,

Bowler Decl. ¶7. Pursuant to FEC regulations, a percentage of all administrative expenses must be paid with federal money.[34] A large percentage of CDP's federal money is, therefore, consumed by administrative expenses. This means that if additional state and local campaign activities are now deemed "federal election activity," existing federal money must be divided between administrative expenses and programmatic expenses.

Although both parties have made significant investments in federal fundraising, federal money is expensive to raise, the average contribution is quite low, and the more effective programs require a significant capital investment. *See* Henderson 315-18sa; Leon at 1240-42sa.[35]

In addition, the Levin Amendment will significantly restrict the usable amount of nonfederal funds available to the parties. This is the very money previously used to fund the lion's share of state parties' ballot measure advocacy. The evidence below demonstrated that 76-86% of the CDP's nonfederal funds raised over recent cycles would not comply with the Levin restrictions; for CRP, the figures are 47-69%.[36] *See* Henderson 316-18sa; Leon 1241-42sa. These findings stand in stark contrast to the finding in *Buckley* that only 5.1% of the money raised by Congressional candidates in that year was in amounts in excess of the $1,000 contribution limit. *Buckley*, 424 U.S. at 21 n.23.

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[34] The FEC regulations requiring state parties to allocate administrative expenses between federal and nonfederal accounts remain in effect, resulting in a need for federal funds beyond that required for "Federal election activity."

[35] For example, in the 2000 cycle, 43% of administrative costs had to be paid with federal money. Bowler Dec. ¶15.

[36] These numbers do not include the loss of transfers, which would reduce the amounts further.

The state and local parties therefore face the prospect of being required to fund a significantly increased percentage of their traditional campaign activities – state and local as well as federal – with either extremely limited federal money or with federally-regulated Levin money. The gap in projected revenues and the historical cost of the state parties' activities are illustrated in Bowler Decl., Ex. C, J.A. 154. *See also* Erwin Decl., Ex. 7 (CRP figures). This graph illustrates, based on historical revenue and expense figures, the projected federal and Levin revenues and CDP's expenses. The gap between the two would have been approximately $16 million (CDP) and $10.6 million (CRP) in the 1999-2000 election cycle.

There is no evidence in the record that Congress gave any meaningful consideration to the impact of BCRA, or new Section 323(b) in particular, upon the state and local parties. The effect of the $10,000 limit on nonfederal contributions is particularly harsh on parties in a state such as California, which has a large population. A State Senate District contains almost 850,000 persons. Because of term limits, California's state legislative and executive offices turn over regularly and the races are more competitive than most federal offices. *See* J.A. 116 Bowler Supp. Decl. ¶4. The cost of a statewide mailpiece can be approximately $260,000. *See* J.A. 132, Bowler Decl. ¶24; Henderson 313sa n.112. CDP's direct mail program in support of state and local candidates costs approximately $7-8 million per cycle. *See* J.A. 124-30, Bowler Decl. ¶20. As the Court has observed, "freedom of association is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective," and "[t]he value of the right to associate is illustrated by the cost of reaching the public." *Citizens Against Rent Control,* 454 U.S. at 296 & n.5 (internal citations omitted).

There is simply no way that the California state parties can withstand this impact (amounting to well over $10 million each) without serious impairment to their programmatic activities and their ability to communicate effectively with their 12 million members. The district court found that the need to use federal money for an increased range of expenditures unrelated to federal candidates, including many state and local election expenditures, and the inability to use the nonfederal money raised by the state parties, is likely to result in a reduction of voter registration activities, generic party-building, and grassroots mobilization. *See* Henderson 320-21sa; Leon 1242-43sa; *see also* J.A. 1434-37, La Raja Decl. ¶22; J.A. 1648-49, Snyder Decl. at 14-15. In addition, the transfer and fundraising restrictions make it impossible for the state and local parties to channel resources to races where they are most needed and/or where they can be used most effectively. The combination of spending limits and association limits will most surely lead to a loss of the "resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21.

D. New Section 323(a) Undermines the Speech and Associational Rights of Minor Parties.

The significant burdens that new Section 323(a) places on rights of political speech and association become especially irrational and crushing for political parties that primarily engage in issue advocacy and that lack the human and financial resources of the major parties. The LNC is both an example and a particular victim of new Section 323(a)'s effect on minor political parties. Most crucially, as applied to the LNC, new Section 323(a) obviously suppresses pure political speech and freedom of association in the name of suppressing campaign finance abuse.

Several examples of LNC nonfederal activity illustrate how new Section 323(a) restricts protected political activity unrelated to federal elections.

First, using nonfederal money, the LNC conducts numerous issue advocacy campaigns, including, for example, advertising campaigns advocating adoption of libertarian policy positions on government spending, drug control, welfare, gun ownership, and taxation. *See* J.A. 196, LNC Decl. ¶35 and the exhibits cited therein. The Libertarian Party also raises funds and advocates for its principles without any express reference to any Libertarian Party federal candidate when major party candidates do not address them. Thus, using nonfederal money, the Libertarian Party ran anti-drug war advertisements to lampoon advertisements being run by the federal government linking the drug war to anti-terrorism efforts. *Id.* ¶12 & Ex. E. New Section 323(a) forbids the LNC from using nonfederal money for these entirely issue-oriented purposes.

Second, every two years, the LNC stages conventions of the Libertarian Party; a nominating convention is held during presidential election years and a purely educational convention in off-presidential election years. *Id.* ¶¶28-31, J.A. 192-94. Non-presidential year election conventions are solely devoted to discussion and advocacy of issues and to internal party matters; the convention neither nominates nor selects candidates for public office. *Id.* ¶29, J.A. 192-93. Nevertheless new Section 323(a) effectively bans receipt of income from corporations for exhibit space rentals, advertising, and sponsorships that are used to finance these conventions. *Id.* ¶ 29. It also effectively forbids corporations from administering off-year conventions, since any costs of administration would amount to forbidden corporate in-kind contributions to the LNC. *Id.* ¶30, J.A. 193. New Section 323(a) also increases administrative costs by creating the need to distinguish between various sources of contributions. The cumulative effect is to significantly increase the cost to potential attendees and perhaps to render off-year conventions entirely infeasible. *Id.* And, in contrast to the

major parties, the LNC receives no government funds for its conventions. *Id.*

Third, the LNC produces educational materials on libertarian issues for sale to the general public and to state and local Libertarian parties and candidates. *Id.* ¶ 32 & Exs. As a the result of BCRA, however, the LNC is forbidden to receive funds for this service from its own state and local parties and candidates as nonfederal money (or even as federal money because such a purchase would pose the risk that the state or local party or candidate would have to file with the FEC as a political committee engaging in federal activity.) *Id.* Not only does this represent a significant loss of revenue to the LNC, but it means that the consistency of the libertarian message may be compromised because state and local affiliates will have to develop materials independently or turn to non-party independent sources for those materials. *Id.*

Fourth, the LNC's monthly newspaper, the *Libertarian Party® News*, engages primarily in education and issue advocacy. *Id.* ¶¶18-19 & Exs., J.A. 189. But new Section 323(a) effectively forbids certain receipts arising from the paper's publication because they constitute nonfederal money. It also increases administrative costs for the *Libertarian Party® News*.

Under new Section 323(a), the LNC would be required to refuse advertising or subscriptions for its newspaper that it presently accepts from both for-profit and not-for-profit corporations (including any library organized as a corporation). *Id.* ¶19, J.A. 189. Moreover, new Section 323(a) would strongly discourage advertising by state or local candidates in the *Libertarian Party® News* since any such candidate would then be subject to FEC filing requirements, because their funds would be deemed to be expended for federal activities. *Id.* Finally, it would disrupt the subscription system by prohibiting one person from

paying for a subscription on behalf of another. *Id.* ¶21, J.A. 189-90.

Finally, even Libertarian Party federal campaigns are primarily directed toward issue advocacy, rather than toward election of any particular candidate. *Id.* ¶¶10-13, J.A. 185-87. Libertarian Party candidates know that they have only a remote chance to win federal office, so they use their candidacies to educate the public on libertarian principles. *Id.* ¶11, J.A. 185-86.[37]

Simply put, the alleged corruption or appearance of corruption of federal officeholders that purportedly justifies new Section 323(a) does not apply to the Libertarian Party. No Libertarian Party candidate has ever won a race for federal office. *Id.* ¶10, J.A. 185.[38] Thus, no Libertarian Party candidate has ever been exposed to the occasion for actual or apparent corruption that new Section 323(a) allegedly protects against. Further, the supposed potential for widespread abuse of nonfederal money by national parties that motivated new Section 323(a) simply does not exist with regard to the LNC. The principal sources of LNC nonfederal money are mailing list rental fees, dues paid through state affiliates and forwarded to the LNC, and advertising in the *Libertarian Party® News* and elsewhere. *Id.* ¶9, J.A. 184. Very little of the nonfederal money received by LNC is from any corporate source (if funds from renting lists or

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[37] Federal candidacies are important to the advancement of libertarian principles and the Libertarian Party because the issues that draw voters to the party are primarily federal and because federal candidates often achieve the crucial percentage necessary to achieve ballot status in future elections. LNC Decl. ¶14, J.A. 187. Ballot access is important because these campaigns provide an important means for the Libertarian Party to disseminate its views.

[38] In the 2000 general election, Libertarian Party U.S. Senate candidates averaged less than one percent (1%) of the vote; Libertarian Party U.S. House candidates averaged less than two percent (2%) of the vote. *Id.*

advertising in the *Libertarian Party® News* are excluded) or from large individual contributions. *Id.* Even so, new Section 323(a) would deprive the LNC of these funds, although they cannot reasonably be deemed a threat of actual or apparent corruption Libertarian Party federal candidates.

Likewise, without reasonable (much less a compelling) cause, new Section 323(a) deprives the LNC of nonfederal money from state affiliates and imposes significant administrative burdens on state affiliates. *Id.* ¶ 9, J.A. 184. It requires restructuring of the manner in which the LNC manages its membership, significantly increasing costs and diminishing possible income from rental of the membership list. *Id.* ¶¶24-25, J.A. 191. It places a significant and disproportionate administrative burden on the limited resources of the LNC. *Id.* ¶¶5-7, J.A. 182-83. New Section 323(a) restricts, and may even destroy, state party campaign and educational efforts and some state parties themselves. *Id.* ¶8, J.A. 183-84.

New Section 323(a) also effectively criminalizes the current structure of the national Libertarian Party as a membership organization that requires the regular payment of dues from members to the LNC. Dues are frequently paid to affiliated state Libertarian Parties, with a portion to be distributed to the national Libertarian Party, so that those who pay dues may be members of both the state and national parties. Further, dues often are paid by one person on behalf of another, then deposited in state affiliates' nonfederal money accounts. *Id.* ¶33, J.A. 195. Under new Section 323(a), however, these funds may not be transferred to the LNC, so that members who pay dues in such a manner must be denied membership in the national Libertarian Party.

To put the LNC's burden in perspective, the LNC is much smaller than the RNC or DNC. It has only eleven full-time employees, one half-time employee and three part-time student employees. *Id.* ¶5, J.A. 182. Only ten state

Libertarian parties have any paid employees, many of them only part-time, and they rely heavily on volunteer staff. *Id.* Because the requirements of FECA are constant, however, the new BCRA restrictions create a greater proportionate burden on the LNC. Moreover, especially because of its ban on nonfederal money, the BCRA will impede LNC's ability to publish its newspaper and educational materials, *id.* ¶¶18-23, 32, 35, J.A. 189, severely impede its ability to stage its educational off-presidential-year national convention (which does *not* nominate any candidates), *id.* ¶¶28-31, J.A. 192-93, and effectively criminalize its present membership structure. *Id.* ¶¶33-34, J.A. 195. In its effect on the LNC, new Section 323(a) is plainly not narrowly tailored to serve any compelling government interest.

E. Section 323(d)'s Prohibitions on Party Involvement With Other Organizations Violate the First Amendment.

New Section 323(d) prohibits any national, state, or local party committee from soliciting for, or donating to, any nonprofit, tax-exempt organization that makes any disbursements for "Federal election activity." New § 323(d)(1). The section also prohibits any party committee from contributing to any organization exempt from tax under IRC section 527 (other than party committees, candidate committees, or federally-registered political committees) regardless of whether that organization disburses any funds for "Federal election activity." New §323(d)(2).[39] These restrictions apply not only to the party committees at all

[39] Section 323(d) does not prohibit transfers among political party committees. ***But see*** new § 323(b)(2)(B)(iv). The FEC allows political party donations to Section 527 committees registered under state law, but only if those committees support only state and local candidates and do not engage in "Federal election activity." 11 C.F.R. § 300.51.

levels, but also to any "officer or agent acting on behalf of" any party committee or entity.

The prohibitions of new Section 323(d) outlaw a stunning array of normal coalition advocacy, as well as civic and associational activity by parties and their officers, employees, and volunteers. Because support for and opposition to ballot measures in California is conducted largely through ballot measure committees, which are organized as IRC § 501(c)(4) entities, *see* Henderson 444-45sa, the ability of the California state parties to give to and solicit funds for ballot measure committees has been critically important. Through such activity, the state parties express support for policies that reflect the party's values, positions, and common ideological goals. These activities are entitled to the highest degree of First Amendment protection. *See Citizens Against Rent Control,* 454 U.S. at 299 ("It is hard to imagine speech more eligible for First Amendment protection" than support of ballot-measure organizations). Because most ballot measure groups engage in some of the activities within BCRA's definition of "Federal election activity," such as GOTV, new Section 323(d) flatly bans the California state and local parties from contributing to or raising funds – even federally-regulated funds – for such groups.

New Section 323(d) also prohibits the parties from contributing to the local Democratic or Republican "Clubs." These clubs are the grass-roots organizations that typically conduct voter registration and walk precincts on or before election day – activities now defined as "Federal election activity." Contributions are prohibited to these organizations because they are organized under IRC section 527. *See* Henderson 449sa.

The ban on contributions to 527 organizations also affects the ability of the parties to participate in other state issues. In California, petitions are currently circulating to

recall the Governor. Many of the committees formed to support or oppose the recall are organized under IRC Section 527. Although the state parties are intensely interested in, and likely to be affected by, a potential recall election, there are serious questions about whether and, if so, when the state parties can contribute to, or solicit for, these committees. If the recall effort qualifies for the ballot, and a special election is set for March 2004 (an election which will include federal races), and these committees engage in GOTV activity within the definition of "Federal election activity," the national, state and local parties, as well as their officers and agents, will be completely prohibited from either contributing *any* money to, or soliciting *any* money for, the recall committees.

By making it a federal crime for party committees to donate to, or solicit for, organizations that share similar values and goals, new Section 323(d) severely burdens the freedom of association of the individual party officers, employees, and volunteers, and of the party committees themselves. As discussed above, solicitation activities by their very nature "'involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas and the advocacy of causes – that are within the protection of the First Amendment.'" *Illinois ex. rel. Madigan v. Telemarketing Associates, Inc.*, 123 S. Ct. 1829, 1836 (2003) (*quoting Riley*, 487 U.S. at 788-89). Such restrictions on solicitation of funds are unconstitutional when they are "not narrowly tailored to achieve the [government]'s asserted interest. . ." *Riley*, 487 U.S. at 788. Even apart from solicitation, the ban on contributions prevents the political parties from "affiliating" and "pooling resources" with like-minded organizations to further shared goals. An outright ban on such a showing of support cannot be squeezed within *Buckley's* allowance of contribution *limits*, especially since any funds that the parties might give have been lawfully raised.

New Section 323(d) cannot be defended as a means of avoiding circumvention by "satellite party organizations." *See* Kollar-Kotelly 987sa. This provision is neither "narrowly tailored," *Riley*, 487 U.S. at 788, nor even "closely drawn" to serve that purpose while avoiding "unnecessary abridgement" of the parties' First Amendment rights. *Buckley*, 424 U.S. at 25. *First*, the provision is not in any way limited to party support for "sham" organizations or satellite party organizations disguised as tax-exempt groups. Rather, it prohibits any solicitation or donation of contributions, by any party or party official, to well-established, clearly independent, nonprofit organizations engaging in "Federal election activity" as BCRA broadly defines it. It also prohibits donations to legitimate 501(c)(4) organizations that support or oppose ballot measures. Moreover, new Section 323(d) prohibits *all* donations, not just those that might be large enough to exert control over the recipient.[40]

Second, it prohibits party committees from contributing not only nonfederal money to nonprofit and nonfederal political organizations, but federally-regulated money as well. For example, new Section 323(d) prevents a local party committee from using even federal money to buy a table at the annual fundraising dinner of the local chapter of the NAACP, because the NAACP engages in nonpartisan voter registration ("Federal election activity").

Third, while new Section 323(d) prohibits donations to or solicitations for these tax-exempt groups by parties, new Section 323(e)(4)(A) allows federal candidates themselves to solicit contributions to nonprofit organizations, without

[40] The vast majority of CDP donations to nonprofit organizations were under $1,000 and were made for ideological reasons (*e.g.*, $250 to the Haight Ashbury Food Program, $200 to Sojourner Women's Center). *See* J.A. 166-67, Bowler Reb. Decl. ¶9.

limitation, from any source, as long as the "principal purpose" of the organization is not to conduct voter registration or GOTV activities and as long as the solicitation is not for funds earmarked for those activities. Federal candidates are, of course, the very individuals who would be directly benefited (or potentially "corrupted") by the supposed circumvention of FECA's contributions limits.

F. By Limiting the Right of Political Parties To Make Independent Expenditures, Section 213 Violates the First Amendment.

The district court unanimously and correctly invalidated Section 213, which requires political parties to choose between making coordinated expenditures or independent expenditures for each of their candidates. *See Per Curiam* 7sa; Henderson 385sa, 396-97sa; Leon 1170-76sa; Kollar-Kotelly 886sa.

Section 213 is a bold attempt by Congress to overrule this Court's decision in *Colorado I*, which recognized the First Amendment right of political parties to make unlimited independent expenditures. Section 213 attacks this right by placing three interrelated restrictions on political parties' use of federal money.[41] (1) The "either/or" element provides that on or after the date a political party nominates a candidate for federal office, all committees of that political party must choose between independent and coordinated spending with respect to that candidate. They may no longer do both. (2) The "one committee" element provides that all political party committees—national, state, and local—are a single committee for purposes of these prohibitions. (3) The "first in time" element provides that the first committee of a political party at the federal, state, or local level to exercise one form

[41] Unlike new Section 323, which concerns "non-federal" money, Section 213 attempts to restrict the use of federal money.

of spending controls all other party committees' spending choices.[42]

As a clear limit on spending, Section 213 is subject to strict scrutiny. Leon 1171sa. Section 213 infringes the political parties' rights of speech and association in three significant ways.

First, it interferes with the political parties' right to make independent expenditures recognized by *Colorado I*, 518 U.S. at 616, by a method different in style but not effect from the prohibition invalidated in that case. Specifically, *Colorado I* rejected the FEC's conclusive presumption that a political party's expenditures were always coordinated expenditures, not independent expenditures. Section 213 simply recasts that conclusive presumption. If a political party makes *any* coordinated expenditure under Section 441a(d)(4), then *all* party independent expenditures are prohibited outright. The Government has proffered no justifiable interest – much less a compelling one – in restricting independent spending by political parties, and the district court found no justification in the legislative record. *See* Kollar-Kotelly 886sa; Leon 1174sa.

Defendants have asserted, as they have with respect to all of BCRA's prohibitions and restrictions upon political parties, that this constitutionally guaranteed right to make independent expenditures presents the opportunity for *circumvention* of candidate contribution limits. The Supreme Court rejected the same argument in *Colorado I*, concluding that political party funds used to make independent

[42] Subdivision (C) of 2 U.S.C.A. § 441a(d)(4) also prohibits one party committee that has made "coordinated expenditures" from transferring federal dollars to another party committee to enable that committee to make independent expenditures.

expenditures raised no serious corruption or circumvention problems. 518 U.S. at 617.

Second, Section 213 conditions the benefit of political party "coordinated expenditures" on behalf of their parties' nominees upon the parties' forbearance of their right to make independent expenditures. This forced choice is *both* a burden on the right to spend independently *and* an unconstitutional condition upon independent spending. *See Perry v. Sindermann*, 408 U.S. 593 (1972); *Elrod v. Burns*, 427 U.S. 347 (1976). The Government invoked *Buckley's* approval of public funding in exchange for spending limits to argue that forcing parties to choose between more generous coordinated expenditure limits available only to political parties and unlimited independent expenditures available to all political committees and individuals is permissible.

As the district court held, however, Section 213, offers no public funds. Henderson 397sa ; Leon 1173sa. It forces a choice between two *existing rights*: one statutory and the other constitutional. Moreover, no anti-corruption rationale has or could be advanced here, since all money at issue is *federally–regulated money* being spent *independently* of the candidates.

Third, Section 213 compels the forced association of party committees at all levels, to effect a collective speech restriction on independent spending by each. Such compelled association was rejected in *California Democratic Party*, 530 U.S. at 581-82. After *Colorado I*, but until BCRA Section 213, political party committees at the local, state, and federal levels could make unlimited independent expenditures and also limited "coordinated expenditures." The record shows, for example, that the RNC made coordinated expenditures at the same time the National Republican Senatorial Committee and the Republican Party of Michigan were making independent expenditures. J.A. 324, Josefiak Reb. Decl. ¶7. Thus, in another way, Section 213 eviscerates *Colorado I*.

The harsh, aggregate effect of this "three-in-one" rule on forced association can be demonstrated by two examples. With respect to *a single state*, one local or state Democratic party committee in California could bind the DNC, the CDP, and all local party committees in California to its decision to engage in independent expenditures or coordinated expenditures on behalf of that state's Senate or Congressional nominees. If a local party committee in Des Moines held a party during the Presidential Nominating Convention in 2004 and spent $100 to produce a banner reading "Re-Elect President Bush," then new Section 213 would prohibit the RNC from making any "coordinated expenditures" on behalf of President Bush in 2004.[43]

Therefore, in order for state or national party committees to protect their preferred spending alternative, these committees would be required to monitor and attempt to control the activities of local party committees. In view of the restrictions on party associational rights imposed by new Section 323 (*see* Part I above), this requirement may be impossible to fulfill, but is unconstitutional in any event.

G. By Mandating That "Coordinated Communications" Encompass Truly Independent Activity, Section 214 Violates the First Amendment.

Section 214 broadens the definition of when an expenditure is deemed to be "coordinated" with a candidate and therefore treated as an "in-kind" contribution under FECA. *See* Section 214(a). It repealed the FEC's existing regulatory definition of coordination, *see* Section 214(b), and

[43] National party committees, but not state and local party committees, may make "coordinated expenditures" on behalf of candidates for President. Compare 2 U.S.C.A. §441a(d)(1) and 441a(d)(2); *see also* 11 CFR §109.32 (FEC Rulemaking re "Coordinated and Independent Expenditures," 68 Fed. Reg. 421, 444 (January 3, 2003)).

instructed the FEC to adopt a new definition of coordination that "shall not require agreement or formal collaboration to establish coordination." Section 214(c).

As Judge Henderson recognized, an expansive definition of "coordination" will necessarily impair the ability of speakers, and especially political parties, to make "independent expenditures." Henderson 386-87sa. In *Colorado I*, this Court refused to accept the FEC's longstanding presumption that all party spending is coordinated, since "[a]n agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." 518 U.S. at 621-22. Rather, the Court looked for evidence of "actual coordination as a matter of fact." *Id.* at 619; *see also FEC v. Christian Coalition*, 52 F. Supp.2d 45, 91 (D.D.C. 1999) ("First Amendment clarity demands a definition of 'coordination' that provides the clearest possible guidance to candidates and constituents").

Because of their relationships with candidates, the Political Party Appellants are most directly injured by the broad definition of coordination required by Section 214 because it subjects *all* their expenditures in support of candidates to the coordinated party expenditure limit, even when the expenditures are truly independent "as a matter of fact." It also purports to make political parties (and derivatively, candidates) responsible for independent expenditures by persons or entities with whom the parties have little if any relationship.

Section 214 is just as offensive to the First Amendment as the "conclusive presumption" of coordination rejected by this Court in *Colorado I*, 518 U.S. at 619. With no express or implied "agreement," or even "formal collaboration," required to show coordination, political opponents are encouraged to file charges of coordination on the thinnest evidence. The consequences can be severe; any

corporate political activity deemed "coordinated" with the party immediately becomes an illegal contribution to the party, and perhaps to the candidate, with severe penalties. *See* Section 312(a). Fear of these penalties will stifle the important efforts of parties to build coalitions – to "associate" – with ideologically-aligned groups.

The district court erroneously held that the RNC Appellants' constitutional challenge to Sections 214(b) and (c) are not justiciable on standing and ripeness grounds. As Judge Henderson correctly noted in dissent, however, that challenge is ripe for review because "[Section] 214 will violate the First Amendment no matter what the [FEC] does, for no regulation it promulgates may depart . . . from the provision['s] plain text." Henderson 394-95sa. Moreover, because constitutional challenges to BCRA must be brought before a three-judge court, *see* § 403(a), while challenges to regulations are heard by a single judge,[44] the court's ruling may effectively preclude review of Section 214's constitutionality. Thus, the Court should reach this issue, and declare Section 214 invalid in its entirety.

II. NEW SECTION 323'S RESTRICTIONS ON POLITICAL PARTIES EXCEED THE POWER OF CONGRESS UNDER THE FEDERAL ELECTIONS CLAUSE AND VIOLATE PRINCIPLES OF FEDERALISM.

It is now a federal crime for the Chairman of the RNC to send a fundraising letter on behalf of a *state* gubernatorial candidate or even a *local* mayoral candidate. The RNC is now precluded from raising and spending money in full compliance with state law even in off-year elections, unless it additionally complies with the extensive federal regulatory

[44] *See* 5 U.S.C. § 702 (providing for judicial review under Administrative Procedure Act).

regime. And it is a federal crime for a *state* political party to use *state*-regulated money to telephone voters urging support for a *state* ballot initiative if it so happens that there is a federal candidate on the ballot. This federalization of the rules for participating in state political processes is unprecedented and directly contravenes the compromise struck by the Founders in Article I, Section 4 of the Constitution (the "Federal Elections Clause").

A. Congress May Not Regulate Purely or Predominantly State and Local Election Activity.

1. The Federal Elections Clause Limits Congressional Power To Regulate Nonfederal Election Activity.

Even though Congress did not specify a constitutional basis for enacting BCRA,[45] the Government has made a binding admission that Congress relied on no other enumerated constitutional power to support Title I.[46] The Federal Elections Clause states:

> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or

[45] In *Buckley*, this Court treated FECA, which BCRA amends, as a product of Congress' power under the Federal Elections Clause. 424 U.S. at 13 & n.16.

[46] *See* J.A. 1800-01, United States' Resp. to RNC's 2d Set of Interrogs. to Defts. (Sept. 19, 2002) at 4 (claiming Commerce Clause basis *only* for BCRA §§305 and 504, which amend Federal Communications Act). This admission should end the matter. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (justification for government action "must be genuine, not hypothesized or invented *post hoc* in response to litigation"); *cf. United States v. Lopez*, 514 U.S. 549, 563 & n.4 (1995) (rejecting Congress' *post hoc* rationalization for its exercise of commerce power).

> alter such Regulations, except as to the Places of choosing Senators.

U.S. Const. Art. I § 4; *see also* S. Rep. No. 92-229, at 99 (1971).

The Clause "was a compromise between those delegates to the Constitutional Convention who wanted the States to have final authority over the election of all state and federal officers and those who wanted Congress to make laws governing national elections." *Oregon v. Mitchell*, 400 U.S. 112, 119 n.2 (1970) (controlling opinion of Black, J.). The debate thus revolved around the question whether the Federal Government should have *any* role at all in regulating elections – even *federal* elections. As the Government's expert, Dr. Donald P. Green of Yale University, acknowledged, the allocation of control over elections was "maybe one of the most vigorously-debated aspects of the constitutional structure." J.A. 867-68, Green CX 142.

Even the most ardent nationalists among the Founders were particularly forceful in warning against federal encroachments into state elections. As Alexander Hamilton wrote in *Federalist* No. 59:

> Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments? The violation of principle in this case would have required no comment.

Echoing Hamilton, Justice Joseph Story observed in dismissing a hypothetical federal power to regulate state elections that "[i]t would be deemed a most unwarrantable transfer of power, indicating a premeditated design to destroy the state governments. It would be deemed so flagrant a

violation of principle, as to require no comment." Joseph Story, 2 *Commentaries on the Constitution of the United States* 284-85 (1st ed. 1833). Notably, Dr. Green has candidly conceded both that (i) the Hamilton view correctly represents the original understanding of the Federal Elections Clause and (ii) BCRA "*goes a lot farther than Hamilton indicated in Federalist Number 59.*" J.A. 868-69, Green CX 148-49 (emphasis added).

Against this background, it is not surprising that this Court has consistently recognized that the Clause provides no authority to regulate state elections. For example, in *United States v. Reese*, 92 U.S. 214 (1875), which evaluated the constitutionality of the Enforcement Act of 1870, the Court dismissed the application of the Clause to a municipal election, noting that in view of the local character of the election at issue, "[t]he effect of art. 1, sect. 4, of the Constitution, in respect to elections for senators and representatives, is not now under consideration." *Id.* at 218. *Ex parte Siebold*, an Enforcement Act case involving ballot-box stuffing in connection with a federal election, similarly emphasized the limitation of the Clause to federal elections: "We do not mean to say . . . that for any acts of the officers of election, *having exclusive reference to the election of State or county officers*, they will be amenable to Federal jurisdiction." 100 U.S. 371, 393 (1871) (emphasis added).

To be sure, the Court has recognized that the Federal Elections Clause may permit some incidental regulation of state elections, but only as necessary effectively to regulate simultaneously-occurring federal elections. For example, *Siebold* noted that "[i]f for its own convenience a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress will not be thereby deprived of the right to make regulations *in reference to the latter*." *Id.* (emphasis added). Thus, Congress may not regulate state elections under the Clause

simply because they happen to occur at the same time as a federal election; rather, the Clause is broad enough only to allow federal regulation carefully tailored to apply *solely* to "*the latter*."

The Court has repeatedly reiterated this principle. In *Blitz v. United States*, 153 U.S. 308 (1894), for instance, the Court dismissed an indictment for impersonating a voter because the indictment did not allege that the defendant had actually voted for Congress, as opposed to a state or local office. The Court there held that "[v]oting, in the name of another, for a state officer, cannot possibly affect the integrity of an election for Representative in Congress," and that "[w]ith frauds of that character [*i.e.*, concerning elections for state office] *the national government has no concern*." *Id.* at 314-15 (emphasis added).

More recently, in *Oregon v. Mitchell*, the Court struck down a provision of a federal law lowering to eighteen the voting age in *state and local elections*, while upholding a provision similarly lowering to eighteen the voting age in *federal elections*. In his controlling opinion, Justice Black emphasized that "[o]ur judgments . . . save for the States the power to control state and local elections which the Constitution originally reserved to them and which no subsequent amendment has taken from them." 400 U.S. at 135. *See also Tashjian*, 479 U.S. at 217 ("[T]he Constitution grants to the States a broad power to prescribe the 'Times, Places, and Manner of holding Elections for Senators and Representatives,' Art. I, §4, cl. 1, *which power is matched by state control over the election process for state offices*." (emphasis added)). Not a single Justice in *Oregon v. Mitchell* argued that the Clause empowered Congress to lower state voting ages. Accordingly, the Federal Elections Clause affirmatively precludes Congress from usurping the states' sovereign right to regulate their own elections.

2. Limitations on Our Federal Structure Require Congress To Respect the Electoral Processes of the States.

Even if (contrary to the Federal Elections Clause) Congress had the power to enact Title I's restrictions on state and local election activity, the statute's extensive intrusion into an area central to state sovereignty would contravene principles of federalism embodied in the Constitution, as well as the Tenth Amendment. *See, e.g., New York v. United States*, 505 U.S. 144, 156-57 (1992).

Under "Our Federalism," the states retain "a large residuum of sovereignty." *Alden v. Maine*, 527 U.S. 706, 748 (1999). That "[r]esidual state sovereignty was ... implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, ... which implication was rendered express by the Tenth Amendment[]." *Printz v. United States*, 521 U.S. 898, 919 (1997). In *Alden*, which principally addressed the scope of states' sovereign immunity under the Eleventh Amendment, this Court warned that:

> Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. *Congress must accord States the esteem due to them as joint participants in a federal system*, one beginning with the premise of sovereignty in both the central Government and the separate States.

Alden, 527 U.S. at 758 (emphasis added). Importantly here, *Alden* emphasized that federal encroachment is of particular concern where a state's sovereign powers of self-governance are at stake: "When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so

essential to our liberty and republican form of government. . . *A State is entitled to order the processes of its own governance.*" *Id.* at 751-52 (emphasis added).

Similarly, in *Oregon v. Mitchell*, Justice Black's controlling opinion emphasized that "[n]o function is more essential to the separate and independent existence of the States and their governments" than the power to determine the qualifications of voters for state and local offices and – significantly here – "the nature of their own machinery for filling local public offices." 400 U.S. at 125; *see also California Democratic Party*, 530 U.S. at 590 (Stevens, J., joined by Ginsburg, J., dissenting) ("A state's power to determine how its officials are to be elected is a quintessential attribute of sovereignty.").[47]

Each of the 50 states has considered and enacted legislation governing the financing of campaigns for state and local office. BCRA superimposes federal restrictions on local, state, and national party participation in state elections. At worst, it overrides those state laws; at the very least it shows no "esteem" for the prerogatives of the states as dual sovereigns. *Alden*, 527 U.S. at 758.

3. Plaintiffs Have Standing To Challenge Title I As Exceeding Congress's Enumerated Powers and Violating Principles of Federalism.

The Political Party Appellants have challenged Title I primarily as an *ultra vires* regulation of state and local election activity with no basis in *any* enumerated power. The

[47] Indeed, in enacting FECA in 1971, a more prudent Congress referred to "the powers reserved in this field to the States" – seemingly an acknowledgment of the Constitution's "reserv[ation] to the States," U.S. Const. amend. X, of the power to regulate their own elections. *See* S. Rep. No. 92-229, at 100.

Government correctly conceded in *Pierce County v. Guillen*, 123 S. Ct. 720 (2003), that the private party plaintiff in that case had standing because the plaintiff alleged "limitations on Congress's delegated powers."[48] The Court did not reach the question of standing, however. *Id.* at 732 n. 10.

Although the states surely are injured by Congress's *ultra vires* exercise of control over their own electoral processes, Congress has restricted the ability of political parties to participate in state and local elections in a variety of ways, *see infra* at 86-91, and subjected them to *criminal* sanctions, without any constitutional authority for doing so. It could hardly be the case that a person injured by a federal law that Congress was not constitutionally authorized to enact is without standing to resist enforcement of that law. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000) (allowing private challenge to Violence Against Women Act as exceeding Congress' authority under the Commerce Clause); *Buckley*, 424 U.S. at 117-18 (private party plaintiffs suffered injury and had standing to challenge FECA provisions on ground that they violated Appointments Clause and separation-of-powers principles).

Moreover, this Court has made clear that "[t]he Constitution does not protect the sovereignty of the States for the benefit of the States or state governments as abstract political entities." *New York*, 505 U.S. at 181. "To the contrary, the Constitution divides authority between federal and state governments *for the protection of individuals*." *Id.* (emphasis added). Congress's disruption of the federal-state

[48] Brief of the United States at 25; *see also id.* (observing that "[t]his Court has adjudicated numerous cases in which federal statutes were challenged as lying beyond the reach of Congress's Commerce Clause power, even when the state where the regulated activity took place raised no objection to the statute.") (*citing United States v. Lopez*, 514 U.S. 549 (1995); *Perez v. United States*, 402 U.S. 146 (1971)).

balance in an area as sensitive as elections threatens the liberties of political parties and their supporters, not merely the sovereignty of the states, and both the political parties and the states have standing to seek redress.[49]

B. New Section 323(a)'s Restrictions on National Party Committees Impermissibly Regulate Purely State and Local Activity.

All three judges of the district court found that during odd-numbered years when there are no federal candidates on the ballot, national parties engage in activities that do not affect federal elections *at all*. During the last two off-year elections, when there were no federal candidates on the ballot, the RNC spent approximately $21 million in nonfederal funds on state and local candidate support, transfers to state parties, and direct expenditures, not counting its commitment of such "overhead" as staff time and travel. *See* Kollar-Kotelly 535sa, 537sa; *see also* Henderson 298sa; Leon 1214sa; J.A. 37-38, Banning Decl. ¶28(a). Even in federal election years, the RNC also engages in extensive activity that affects *only* state and local elections, directly contributing, for example, $5.6 million to state and local candidates in 2000. *See* Henderson 297sa; Leon 1212sa; J.A. 305, Josefiak Decl. ¶61. And finally, a major portion of the RNC's budget during federal election years has historically gone toward Victory Plans, the full-ticket voter mobilization plans that affect far more state and local elections than federal elections. *See* pp. 19-20 above.

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[49] Judge Kollar-Kotelly cited this Court's *dicta* in *Tennessee Electric Power* v. *TVA*, 306 U.S. 118 (1939), for the proposition that only states have standing to bring Tenth Amendment claims, thus conflating the Elections Clause inquiry with the Tenth Amendment. *See* Kollar-Kotelly at 1001sa. *But see Steward Mach. Co.* v. *Davis*, 301 U.S. 548 (1937); *Pierce County*, 123 S.Ct. at 732 n.10 (private party standing under Tenth Amendment remains open question).

New Section 323(a) federalizes all these activities on pain of criminal sanctions. To participate at all in purely state election activity, such as this year's off-year elections, the RNC must comply fully with the federal regulatory regime, in addition to the state regulatory regime. This Court has never condoned federal regulation of purely state election activity, especially when there is not even a federal candidate on the ballot.

Moreover, new Section 323(a) totally federalizes all "mixed" election activities undertaken by the RNC. In contrast to the superseded allocation regulations, which required an allocation between federally-regulated and state-regulated money for such activities, new Section 323(a) shows no "esteem" whatsoever for the regulatory regimes of the dual sovereigns. It would, of course, be an affront to the federal government for a state to require the RNC to participate in a Senate election with purely state-regulated money simply because there are state candidates on the ballot. It is no less an affront to the state for new Section 323(a) to instruct the RNC to participate in gubernatorial elections with purely federally-regulated money even when there are *no* federal candidates on the ballot.

C. New Section 323(b) Impermissibly Regulates State and Local Political Activity.

In new Section 323(b), Congress attempted to assert its power under the Federal Elections Clause to regulate the financing of state and local elections – even to the point of regulating spending that does nothing more than expressly advocate the election or defeat of a state or local candidate.

Although the Government has sought to minimize the scope of the statute, the district court confirmed its effect on a broad range of state and local election activity. These activities include generic party appeals that mention no candidates, mail and doorhangers that mention only state or

local candidates, and even ballot measure activity. Henderson 436-437sa. BCRA reaches not only activities directed at federal candidates, but also generic activities that refer to no candidates, and even activities in support of state or local candidates and ballot measures.

As the court below found, BCRA does not merely replace the previous administratively imposed allocation scheme with a new statutory allocation scheme. The previous allocation rules were limited to "generic" voter activities and allowed the costs of those activities to be allocated between federal and nonfederal funds. The allocation rules never purported to regulate pure state or local election activity. Those rules implicitly reflected the fact that the Act regulated only expenditures "for the purpose of influencing" a federal election, and supplied a methodology for apportioning expenditures that arguably had more than one purpose.[50] In contrast, "Sections 301(20) and 323(b) . . . abandon the rough balance struck by the allocation regulations. They require state parties to spend federal funds on activities that will not plausibly corrupt any federal candidate." Henderson 434sa. Or, as Judge Leon stated, "It is simply not enough to claim that just because the use of a donation has *some* effect on a federal election, it must be completely funded with federal funds." Leon 1123sa.

In fact, that is precisely what the Government and Intervenors have asserted. They have essentially abandoned the requirement that an expenditure be "for the purpose of influencing" a federal election or even that it be likely to corrupt a federal candidate, and have replaced these with a standard that allows federal regulation to be imposed unless

[50] The fact that the parties lived within the allocation rules does not mean they concede that the federal government has authority to regulate all of those activities, as Judge Kollar-Kotelly has suggested. *See* Kollar-Kotelly 533-37sa. They have argued just the opposite.

it can be demonstrated that the activity has *no effect* on a federal election.

Thus, they have argued that because of voters' "partisan proclivities," activities in support of state candidates can be regulated; that since state redistricting decisions "affect" federal elections, party redistricting activities can be limited; that if state ballot measures have a "partisan" appeal, or are likely to mobilize voters along party lines, those activities can be federally regulated. Indeed, they have argued that even if a nonfederal contribution is used for nonfederal purposes that does *not* affect federal elections, it "frees up" federal money that might otherwise have to be used and thus influences federal elections.

Using the Government's logic, Congress could impose contribution limits directly upon state or local candidates, because their funds may be used to increase voter turnout, and increased turnout may "affect" a federal race.[51]

California law limits contributions to the parties for candidate-related expenditures to $26,600. Contributions for non-candidate-related expenditures are not limited. The $10,000 Levin contribution limit is *less than half* the limit that California has declared to be appropriate (and, presumably, noncorrupting) for contributions to the political parties for candidate-related uses. In fact, the voters made a specific finding that contributions to the parties have an "insulating" effect. *See* Henderson 310-11sa; Leon 1227sa. The fact that California has decided to allow unlimited contributions for other purposes is in part an

[51] Intervenors have, in fact, made this argument in their lawsuit challenging the recently adopted FEC regulations. *Shays v. FEC*, *supra*. Intervenors argue that the Levin limits on nonfederal contributions should apply to associations of state and local candidates for communications mentioning only state or local candidates if those communications are "Federal election activity."

acknowledgment of the constitutional limits in this area, but also reflects a specific policy decision that expenditures for those other purposes do not share the dangers associated with candidate-related expenditures.

It should be undisputed that California has "control over the election process for [its own] offices." *Tashjian*, 479 U.S. at 217. This authority was reserved to the states in the Constitution and "no subsequent amendment has taken [it] from them." *Mitchell*, *supra*, 400 U.S. at 135. BCRA deprives the states of that authority, and prohibits the parties from participating in state and local elections in the very ways authorized by the states.

The BCRA definition of "Federal election activity" simply does not take into account that the parties' activities may have a state or local, rather than a federal, focus. The court found as a matter of fact that the state parties' voter registration activities, direct mail, phone bank activities, and grassroots mobilizing activities were all typically driven more by state election activity than federal. Leon 1227-31sa; Henderson 311-14sa. BCRA fails to accommodate the state's interest in regulating its own elections or the parties' interest in being able to differentiate between "federal" election activity and "state" activity for purposes of ordering their conduct.[52] By imposing its own significant limitations on the use of funds lawfully raised under state law by state and local political parties for use in state and local elections, Congress has effectively invalidated the choices made by those state governments for the conduct of their own elections, and subjected the political parties to federal regulation which it has no authority to impose.

[52] The Government's references to the *possible* "effects" that certain state and local election activities might have on a federal election is all the more troubling since Congress made no findings on such "effects." *See* Henderson 431sa.

III. NEW SECTION 323 DISCRIMINATES AGAINST POLITICAL PARTIES IN RELATION TO SPECIAL INTEREST GROUPS ENGAGED IN IDENTICAL ACTIVITIES.

BCRA will not only weaken political parties in absolute terms; it will weaken them relative to special interest groups like the NRA, the Sierra Club, and NARAL. *See* J.A. 1617-18, Milkis Reb. Decl. ¶16. Although interest groups engage in many of the same activities as parties, *see supra* at 23; J.A. 870, Green CX 158 (NAACP GOTV plan "is not very different" from Missouri Republican Party Victory Plan), BCRA saddles parties alone with unique burdens. Specifically, it imposes broad-ranging restrictions on political parties, but then – inexplicably – leaves narrow special interest groups almost wholly free to raise and spend nonfederal funds without disclosing the bulk of their activities.[53]

A. Political Parties Are Guaranteed Equal Protection by Both the First and Fifth Amendments.

BCRA's disparate treatment of political parties is subject to strict constitutional scrutiny. Under the First Amendment, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). When the Government selectively imposes speech burdens – even if it does so on the basis of content-neutral criteria such as the size or income of the speaker – it poses the real danger of "distort[ing] the

[53] BCRA's disclosure provisions apply only to *broadcast advertising* that fits the definition of "electioneering communications," BCRA § 201(a), and do *not* apply to the GOTV activities on which interest groups spend much of their nonfederal money.

market for ideas" and thus runs a risk "similar to that from content-based regulation." *Leathers v. Medlock*, 499 U.S. 439, 448 (1991). As Justice O'Connor has emphasized, "[l]aws that single out particular speakers are substantially more dangerous, even when they do not draw explicit content distinctions." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 676 (1994) (concurring and dissenting opinion).

Even though "Congress ordinarily need not address a perceived problem all at once," when regulating speech, a "selective ban" simply "cannot be defended on the ground that partial prohibitions may effect partial relief." *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). Even if a *uniformly* imposed speech burden would be justified by sufficiently weighty government interests, selective or "underinclusive" regulations are invalid unless the government can *independently* justify differential treatment. *See City of Ladue v. Gilleo*, 512 U.S. 43, 51-52 (1994); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 187-91 (1999); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418, 424-25 (1993).

There can be little doubt that BCRA singles political parties out. New Section 323 imposes a broad array of restrictions on parties, including but not limited to the "soft money ban." In contrast, corporations, unions, trade associations, and other interest groups not only avoid the collateral restrictions, but are largely unrestricted in raising and spending unlimited, unregulated, and undisclosed money from any source to pay for such activities as: voter registration; GOTV; phone banks, mail, and leafleting *at any time*; any broadcast advertising except for "electioneering communications;" and communications in any form on any subject – including endorsements of federal candidates – to their officers, shareholders, and members. *See* J.A. 697-98, Peschong Decl. ¶¶13-14; J.A. 1733-34, FEC Resp. to RFAs Nos. 101-108. Rather than using a scalpel to regulate

specific uses of nonfederal money that it found particularly objectionable, Congress in BCRA used a meat cleaver on political parties while leaving special interest groups largely untouched.

Equal protection analysis under the Fifth Amendment leads to the same result. "Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest." *Austin*, 494 U.S. at 666.

Specifically in the campaign finance context, the Court has held that political parties may *not* be singled out for unfavorable treatment. In *Colorado I*, the Court observed that "[w]e do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." 518 U.S. at 618; *see also id.* at 616 ("The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." (emphasis added)). *See Eu*, 489 U.S. at 217 (noting oddity of rule under which, "[a]lthough the official governing bodies of political parties are barred from issuing endorsements, other groups are not").[54]

The Court did not retreat from this principle in *Colorado II*. The only question at issue in *Colorado II* was whether "a party is . . . in a different position from other

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[54] *See also Citizens Against Rent Control*, 454 U.S. at 296 ("any limit . . . on individuals wishing to band together to advance their views … , while placing none on individuals acting alone, is clearly a restraint on the right of association."); *cf. Bellotti*, 435 U.S. at 777 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

political speakers," entitling it "to demand a generally *higher* standard of scrutiny" when it comes to coordinated expenditures. 533 U.S. at 445 (emphasis added). Answering that question in the negative, the Court created the opposite bookend for *Colorado I*: Parties are perhaps entitled to no greater protection than other actors (*Colorado II*), but they are certainly entitled to no less (*Colorado I*). Referring to *Colorado I*, the Court said there was "no justification for subjecting party election spending across the board to the kinds of limits previously invalidated when applied to individuals and nonparty groups." *Colorado II*, 533 U.S. at 444.

Nor can these additional restrictions on political parties be salvaged on the ground that nonfederal spending by parties – as opposed to nonfederal spending by special interest groups – is *uniquely* likely to corrupt or appear to corrupt public servants. The Court in *Colorado I* has already rejected this very argument, stating it was "not aware of any special dangers of corruption associated with political parties that tip the constitutional balance" away from them and toward other political groups; rather, it said, the logic seemed to cut the other way. 518 U.S. at 616-17. The Court further observed, in language particularly relevant here, that the potential of "unregulated 'soft money' contributions to a party for certain activities such as electing candidates for state office or for voter registration and 'get out the vote' drives" to corrupt is "*at best, attenuated.*" *Id.* (emphasis added). Those conclusions are amply supported by the record evidence introduced here.

B. Section 323 Puts Political Parties at a Distinct Disadvantage in Relation to Special Interest Groups.

Title I plainly "classifies"; it does so on its face ("Soft Money *of Political Parties*"). Nor is it debatable that Title I "impinges" on the "right to engage in political expression."

The simple fact that political parties have preferred access to the ballot, or that FECA grants political parties certain advantages, cannot justify unique speech disabilities. Congress and the states have accorded parties these advantages because parties serve an important purpose in the American political system, not as an excuse to saddle them with other hardships. *Cf.* S. Rep. No. 93-689, 1974 U.S.C.C.A.N. 5587, 5593 ("[A] vigorous party system is vital to American politics ...."). This Court has never invoked, nor even mentioned, these advantages to uphold unique restrictions on political parties. *California Democratic Party*, 530 U.S. 567; *Eu*, 489 U.S. 214; *Tashjian*, 479 U.S. 208; *Colorado I*, 518 U.S. 604.

Nor is avoidance of the "appearance of corruption" created through the "access" provided to nonfederal donors sufficient to justify the unique restrictions on political parties.

First, to the extent the specter of special access is a problem at all as it relates to political parties, it is no more a problem among *nonfederal*-money donors (the subject of BCRA regulation) than among *federal*-money donors. Indeed, as the FEC has admitted, there is no evidence that officeholders are more likely to meet with nonfederal-money donors than with federal-money contributors. *See* Henderson 330sa; Leon 1264sa.

Moreover, BCRA's restrictions on political parties do not materially limit interest group "access." Apart from their extensive lobbying activities, it is undisputed that special interest groups "use federal officeholders to raise funds," and "host[] fundraisers much like those that parties conduct, featuring opportunities for wealthy donors and corporate executives to meet with federal officeholders." J.A. 1619, Milkis Reb. Decl. ¶19. Indeed, representatives of EMILY's List, NARAL, the League of Conservation Voters, and the Sierra Club, among others, have all candidly acknowledged

that federal officeholders appear at group-sponsored fundraising events. *See* Henderson 335-36sa.

Notably, the FEC has admitted that "there is a potential for corruption or the appearance of corruption when non-political party organizations" (*e.g.*, interest groups) that pay for issue advocacy, voter registration, voter identification, and GOTV activity "with nonfederal money also lobby federal officeholders." J.A. 1734-35, FEC Resp. to RFAs Nos. 109-113.[55]

This substantial underinclusiveness indicates that "the interest given in justification of the restriction is not compelling." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993); *see also City of Ladue*, 512 U.S. at 52 (exemptions to an otherwise legitimate regulation of speech "diminish the credibility of the government's rationale for restricting speech in the first place"); *Republican Party of Minnesota v. White*, 536 U.S. 765, 779-80 (2002) (Scalia, J., concurring).

Defendants' effort to justify BCRA's restrictions on political parties by asserting that the restrictions will prevent donors from using nonfederal donations to parties as "conduits" for circumventing direct contribution limits to candidates is fatally undermined by BCRA's exclusion of special interest groups *themselves* from the ban on spending nonfederal money. Applying a speech restriction to a potential indirect *conduit* (the party), while carving an

[55] Defense expert Dr. Mann acknowledged that special interests engage in such activities as "electioneering communications" to "curry favor" with officeholders and gain "access." J.A. 1561-62, Mann Decl. 33-34; J.A. 927-28, Mann CX 148-49. Even if BCRA's limits on electioneering communications were upheld, Dr. Mann concedes, special interests would continue to "curry favor" through election-related activities, such as voter mobilization, paid for with completely unregulated and undisclosed nonfederal money. J.A. 927-28, Mann CX 148-49.

exception for the principal *actor* (the donor) to take the same action *directly*, is even more "facial[ly] underinclusive" than the speech restrictions at issue in *Florida Star* that "raise[d] serious doubts about whether" the measure served the asserted purposes in that case. 491 U.S. at 540. Such an exemption, in fact, renders the statutory scheme wholly irrational as an effort to achieve its purported purpose.

Indeed, *Colorado II* demonstrates the facial invalidity of the speaker-based distinction drawn in BCRA. *Colorado II* did not suggest political party spending *per se* creates "undue influence on an officeholder's judgment" (let alone a likelihood of outright *quid pro quo*). *Colorado II*, 533 U.S. at 440-41; *accord Buckley*, 424 U.S. at 28 n.31. Rather, it held that a party's expenditures, when actually coordinated with a candidate's campaign, could be limited *only because the party was potentially acting as a "conduit" for donations by other political actors* – namely, special interests and PACs – who "do not pursue the same objectives in electoral politics that parties do" but, instead, "are most concerned with advancing their narrow interest[s]" and "seek to produce obligated office holders" through their contributions. 533 U.S. at 451-52 (internal quotation marks omitted). Thus, the Court held, because coordinated expenditures are the functional equivalents of "direct party contribution[s]" to candidates *and* because special interests could attempt to use those party contributions "to place candidates under obligation," Congress could limit parties' coordinated expenditures as a means of preventing potentially corrupting effects of special interest contributions. *Id.* at 452, 464-65.

BCRA, however, turns this reasoning on its head: It prohibits the unwitting party conduit from making noncorrupting disbursements of nonfederal money while simultaneously permitting – indeed encouraging – the special interests themselves to make the same disbursements (for GOTV, unregulated issue advocacy, and so forth). *Colorado*

I, 518 U.S. at 617 ("[i]f anything, an independent [party] expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem *less* likely to corrupt than the same (or much larger) independent expenditure made *directly* by that donor.") (emphasis added).

Defendants' expert Dr. Paul Herrnson summed up well: Use by political parties of non-federal funds "does not create such strong policy-oriented IOU's between contributors and legislators as those created by narrowly-focused interest groups that spend soft money to help only a few candidates." J.A. 877, Herrnson Dep. at 208-09 (*quoted* in Henderson 415sa). The severe differential treatment imposed by Title I on political parties simply cannot be justified by a claim that parties are *more* likely then special interest groups to corrupt federal officeholders.

CONCLUSION

For the reasons set forth above, the Political Party Appellants urge the Court to hold BCRA Sections 101, 213, and 214 unconstitutional, invalid, and unenforceable.

Respectfully submitted,

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